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No. 73-1234

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 23–50) is not yet reported. The Board's decision in *Linden* (Pet. App. C, pp. 54–118) is reported at

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[1] The petition covers two cases which were consolidated in the court of appeals—*Truck Drivers Union Local 413, International Brotherhood of Teamsters, etc.* v. *National Labor Relations Board*, No. 71-1529 (hereafter *Linden*), and *Textile Workers Union of America* v. *National Labor Relations Board*, No. 72-1794 (hereafter *Wilder*).

190 NLRB 718. The Board's initial decision in *Wilder* (Pet. App. D, pp. 119–159) is reported at 173 NLRB 214, and the decision of the court of appeals remanding it for reconsideration (Pet. App. E, pp. 160–164) is reported at 420 F.2d 635. The Board's two supplemental decisions in *Wilder* (Pet. Apps. F and G, pp. 165–193) are reported at 185 NLRB 175 and 198 NLRB No. 123.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 51–53) was entered on September 13, 1973, and amended on November 6, 1973. On December 6, 1973, the Chief Justice extended the Board's time for filing a petition for a writ of certiorari to and including February 10, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, who has not engaged in conduct which would preclude the holding of a fair election, violates his bargaining obligation under the National Labor Relations Act by declining to accept the union's authorization card or picket line indication of employee support and insisting, instead, that the union establish its representative status in a Board election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employes, subject to the provisions of section 9(a).

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have

presented to him a claim to be recognized as the representative defined in section 9(a);
the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. THE BOARD'S DECISIONS

1. LINDEN

At the end of December 1966, Dow Norman, an agent of Local No. 413 of the Teamsters obtained, at an organizational meeting, signed cards from 12 employees of Linden Lumber Division, Summer & Co. ("Linden").[2] authorizing the Union to represent them for collective bargaining (Pet. App. C, pp. 78–79).[3] On January 3, 1967, Local 413 wrote to Linden requesting recognition and stating that a majority of its "truck drivers, warehousemen, production workers, maintenance men and yard men" had designated the

[2] Linden manufacturers prefabricated homes and sells lumber products (Pet. App. C, p. 78).

[3] Included were the cards of two employees, Marsh and Shafer, who the Company alleged were supervisors (Pet. App. C, p. 79). Excluding Marsh and Shafer, there were 10 employees in the appropriate bargaining unit which the Union sought to represent (Pet. App. C, p. 84).

Union as their collective bargaining representative (Pet. App. C, p. 79). Two days later, Local 413 filed a petition with the Board's Regional Office for a representation election (Pet. App. C, p. 79). On January 6, Linden denied the request for recognition, expressing doubt of the Union's majority status and suggesting that a Union petition for a Board election would be "the proper way to determine such questions" (Pet. App. C, p. 79).

On February 3, a prehearing conference was held by a Board Hearing Officer on Local 413's representation petition. During the meeting, Union Attorney Smedstad asked Company Consultant Rector about the possibility of entering into a consent election agreement. Rector said that he would not enter into such an agreement because Local 413 had been organized by supervisors (Marsh and Shafer, see n. 3, *supra*), and it would be unlawful for Linden "to recognize any union that had been organized by supervisors" (Pet. App. C, p. 56). The Hearing Officer noted that Linden's claim of supervisory influence in the organization of Local 413 related to the Union's administrative showing of interest and could not be litigated at a representation hearing (Pet. App. C, p. 56).[4]

[4] See Section 101.18(a) of the Board's Statements of Procedure, 29 C.F.R. 101.18(a); *National Labor Relations Board v. Air Control Products of St. Petersburg*, 335 F. 2d 245, 250–251 (C.A. 5).

However, pro-union conduct by a supervisor during an organizational campaign may be grounds for setting aside a representation election or provide a defense to a refusal-to-bargain charge. *Air Control Products*, *supra*, 335 F. 2d at 250. Here, the trial examiner ultimately found that Marsh was not a

When Rector maintained his position, the Union withdrew the representation petition (Pet. App. C, p. 56). Thereafter, Rector told Smedstad that, if Local 413 submitted a new petition supported by a "fresh" 30 percent showing of interest, Linden would enter into a consent election agreement. Smedstad replied that Local 413 already had "all the people lined up." Rector repeated that, since supervisors had solicited these people, without a fresh showing of interest, no consent election could be agreed upon at that point and no bargaining would take place (Pet. App. C, pp. 56–57).

The next day, February 4, Union Representative Norman met with the employees and informed them of what had occurred at the prehearing conference. Nine employees then signed a statement distributed by Norman reaffirming their desire to be represented by Local 413. Both Marsh and Shafer attended the meeting but neither signed the statement. (Pet. App. C, p. 57). On February 6, Norman presented the statement, together with another request for recognition, to Linden's general manager, who referred the matter to Rector (Pet. App. C, p. 57). On February 8, Rector wrote to Local 413 denying its renewed request for recognition because "your membership includes supervisors * * * who influenced and dominated employees of the proposed unit." The letter added that Local 413 had the opportunity to prove its claim before the

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supervisor (Pet. App. C, p. 86), and that, while Shafer was, "there is no evidence * * * that he solicited employees or otherwise enlisted their support of the Union" (Pet. App. C, p. 117).

Board, but had withdrawn its representation petition (Pet. App. C, p. 57).

No new petition was filed by the union. Instead, on February 15, all but one of the employees who signed the reaffirmation statement struck in support of the Union's demand for recognition and picketed the company's premises (Pet. App. C, p. 57). On February 23, the Union filed a refusal to bargain charge with the Board. The strike terminated on June 1 (Pet. App. C, p. 57).

The Board (Members Brown and Fanning dissenting) held that, absent independent unfair labor practices which would preclude a fair election, an employer "should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election," and accordingly dismissed the complaint insofar as it alleged that the Company had unlawfully refused to bargain with the Union (Pet. App. C, pp. 63–64).[5] The Board noted that the Company had never agreed to any voluntary means for resolving the Union's claim of majority status other than a Board election (*ibid*). The Board further rejected the Union's contention that a Section 8(a)(5) finding was warranted because the picket line showing afforded the Company

[5] The Board found, however, that the Company violated Section 8(a)(3) of the Act by failing to reinstate two of the strikers. But, the Board further found that, since these unfair labor practices occurred well after the start of the organizing campaign and under circumstances which would not lead other employees to view them as retribution for such activity, they did not preclude the conduct of a fair election. (Pet. App. C, pp. 58–59).

"independent knowledge" that the Union possessed majority support and the Company made no effort to secure a Board election to resolve any doubt it may have had. The Board concluded that consideration of these factors would require it to reenter the "thicket" of assessing the employer's "good-faith," an inquiry "which we announced to the Supreme Court in *Gissel*[6] we had 'virtually abandoned * * * altogether'" (Pet. App. C, p. 63).

2. WILDER

On October 12, 1965, representatives of the Textile Workers Union visited the plant of the Wilder Mfg. Co. ("Wilder"), a manufacturer of cooking utensils. They presented the Company with 11 signed and 2 unsigned authorization cards,[7] stated that they represented a majority of Wilder's production and maintenance employees, and requested recognition.[8] Wilder official Walter Derse looked over the cards, commenting that some were unsigned. Union Representative Cohen stated that two unsigned cards were included

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[6] *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 (*infra*, pp. 11–12).

[7] The card was an application for membership in the Union and designated the Union as the employee's representative for purposes of collective bargaining (Pet. App. D, p. 128, n. 7).

[8] There were 30 employees at Wilder's plant, 18 of whom were included in the production and maintenance unit ultimately found appropriate by the Trial Examiner. The Examiner rejected the Company's contention that 7 technical employees also should be included in the unit (Pet. App. D, pp. 130–140).

because the employees involved had indicated that they wanted to sign but the Union had not yet obtained their signatures. Cohen again requested recognition, but Derse replied that he had no authority to make that decision—that it could not be made until his brother, Vice-President Arthur F. Derse, Jr., returned from out-of-town. (Pet. App. D, p. 120.)

Cohen left and shortly thereafter the 11 employees who had signed authorization cards left the plant and established a picket line[9] (Pet. App. D, p. 121). The next day Cohen telephoned Walter Derse, repeated his request for recognition and stated that he had obtained employee signatures on additional authorization cards.[10] Derse reiterated that he could not answer the request until after he met with the other officers later that evening (Pet. App. D, p. 121).

Wilder's officers met during the evening of October 13. Walter Derse, in answer to a question, stated that only 10 or 11 employees were on strike. He added that, since there were 30 employees at the plant, the Union could not possibly represent a majority. The officers decided not to recognize the Union. (Pet. App. D, p. 121). The Union's further requests for recognition were denied, whereupon the Union filed unfair labor practices charges with the Board (Pet. App. D, p. 121).

The Board (Member Fanning dissenting), relying

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[9] The picketing continued for approximately five months (Pet. App. D, p. 146).

[10] Two more employees signed cards and joined the picket line that day (Pet. App. D, p. 129).

on its decision in *Linden*,[11] dismissed the complaint.[12] It reiterated that, "absent employer unfair labor practices, the objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority-support foundation for a bargaining relationship" (Pet. App. G, p. 182, emphasis omitted).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals reversed the Board's rulings that the employers had not refused to bargain by requiring that the unions establish their majority status in an election. It held that, "[w]hile * * * cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such 'convincing evidence of majority support' so as to require a bargaining order, they certainly create a

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[11] In its initial decision in *Wilder*, issued prior to *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, the Board dismissed the complaint on the ground that there was no evidence that the Company's refusal to bargain had been in bad faith (Pet. App. D, p. 122). The court below remanded the case to the Board for reconsideration in light of *Gissel* (Pet. App. E, pp. 160–164). In its first supplemental decision, the Board found an unlawful refusal to bargain on the ground that the Company knew that the Union possessed majority support and had no "genuine willingness * * * to resolve any lingering doubts * * * [through] the Board's election procedures" (Pet. App. F, pp. 169–170). After its decision in *Linden*, the Board issued a second Supplemental Decision in *Wilder*, reversing its earlier finding of an unlawful refusal to bargain.

[12] The complaint alleged a refusal to bargain in violation of Section 8(a)(5) of the Act, and also alleged restraint and coercion in violation of Section 8(a)(1). The Board's dismissal of the latter allegations (Pet. App. D, pp. 119, 125–128) is not in issue here.

sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid any duty to bargain and any inquiry into the actuality of his doubt" (Pet. App. A, p. 47). The court remanded the cases to the Board "to reconsider what option, consistent with the statute, it wishes to follow" (Pet. App. A, p. 50).[13]

REASONS FOR GRANTING THE WRIT

1. This case presents a question which was left open in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. The Court there sustained the Board's authority to require an employer to recognize and bargain with a union that based its claim to representative status solely on the possession of union authorization cards, where the employer had engaged in independent unfair labor practices which tended to preclude the holding of a fair election. Accordingly, the Court found it unnecessary to decide whether a bargaining order based on cards or some other showing of employee support other than certification in a Board election "is ever appropriate in cases where there is no

[13] The Court indicated that (Pet. App. A, p. 47, n. 47):

"The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election * * *. Without such a *per se* rule, * * * the Board would have to use some version of the "independent knowledge" test [discussed *infra*, p. 13] it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order."

interference with the election processes" (*id.* at 595, see also *id.* at 601, n. 18). That question is presented here.

2. The Board's conclusion that, irrespective of whether he establishes a "good faith doubt," an employer who has not prejudiced the holding of a fair election by unfair labor practices and who has not agreed to a voluntary method of resolving the union's majority status need not bargain with a union until it has verified its card or picket line indication of employee support in a Board election constitutes a reasonable and proper interpretation of the statute.

a. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides, in pertinent part, that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit. * * *" Section 9(c)(1) permits the employees, the union, or the employer to petition the Board for a secret ballot election to determine whether any individual or labor organization is the majority representative of a particular group of employees.

Under the *Joy Silk* doctrine,[14] which the Board followed for many years, an employer could lawfully refuse to bargain with a union claiming representative

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[14] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced, 185 F. 2d 732 (C.A. D.C.), certiorari denied, 341 U.S. 914.

status through possession of authorization cards only if he had a "good faith doubt" about the union's majority status. The Board would find a lack of good faith and enter a bargaining order where the employer had committed independent unfair labor practices or he presented no reasons for entertaining any doubt. However, as the Board stated during the oral argument in *Gissel*, by then it "had virtually abandoned the *Joy Silk* doctrine altogether".

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union * * *. [*Gissel, supra*, 395 U.S. at 594.]

This principle was qualified by the "independent knowledge" exception, *i.e.*, "an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union." *Ibid.*; see *Snow & Sons*, 134 NLRB 709, enforced, 308 F. 2d 687 (C.A. 9).[15]

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[15] In that case, the employer, upon being presented with an apparent card majority, agreed to submit the cards to an impartial third party for authentication, but, after authentication, he still refused recognition, claiming that he never considered the agreement binding.

b. In the present cases, the Board applied the principle that the employer's subjective motivation in refusing to accept a union's card or picket line indication of employee support is irrelevant. The Board further concluded that the same considerations which justify this view also render irrelevant inquiry into whether the employer has "independent knowledge" of the union's employee support.

While cards are not totally unreliable as an indication of employee support for a union, an employer may have many valid objections to recognizing a union on that basis.[16] An inquiry into whether an employer has declined card-based recognition because he does not trust cards or because he opposes unions is unlikely to yield a reliable answer. An employer opposed to unions could mask his true motive merely by stating that he believes the cards are unreliable; while an employer who rejected the union's request without comment could be found "guilty" of a refusal to bargain even though in fact he had been motivated by a distrust of the cards.

Similar difficulties are encountered in attempting to ascertain whether the employer has knowledge "independently" of the cards which would confirm the union's majority status. As the court below recognized,

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[16] The employer may believe that cards "cannot accurately reflect an employee's wishes, either because [he] has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth." Moreover, "cards are too often obtained through misrepresentation and coercion * * *." *Gissel*, *supra*, 395 U.S. at 602.

the fact that a majority of the employees strike and picket does not necessarily establish that they desire the union as their representative.[17] As the Board explained (Pet. App. C, p. 63):

> Unless, as in *Snow & Sons* [n. 15, *supra*], the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? * * *

For these reasons, the Board was warranted in declining to inquire whether an employer was motivated by a good faith doubt in rejecting a union's card or picket line indication of majority, and in adopting, instead, the clear-cut rule that an employer who has not prejudiced the conduct of a fair election by unfair labor practices does not violate Section 8(a)(5) of the Act merely by insisting that the union verify its majority in a Board election.[18] This position, moreover, harmonizes Section 8(a)(5) with the other provisions of the Act and effectuates its policies.

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[17] "Refusal to cross a picket line may reflect mere fear," or "it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative" (Pet. App. A, p. 44, n. 44).

[18] However, in order to encourage the parties to adhere to their voluntary agreements, the Board will continue to find a refusal to bargain in the situation presented in *Snow & Sons*, n. 15, *supra*. That is, if an employer agrees to have majority status determined by a means other than a Board election, he may not disclaim that determination, and insist on a Board election, simply because he disagrees with it. (Pet. App. C, pp. 64–65; *Nationwide Plastics Co.*, 197 NLRB No. 136, 81 LRRM 1036; *Sullivan Electric Co.*, 199 NLRB No. 97, 81 LRRM 1313, enforced, 83 LRRM 2513 (C.A. 6.)

"[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel, supra*, 395 U.S. at 602. As noted (*supra*, p. 12), Section 9(c)(1) of the Act permits either the union or the employer to petition for an election, and, where no interference has occurred, an election can be held expeditiously.[19] The Board's present position encourages the resolution of representation questions by this salutary means. On the other hand, to issue bargaining orders based on a card or picket line indication of majority support where a fair election could be held, is likely to delay resolution of the representation question for a considerable period of time. Unfair labor practice proceedings, particularly where the validity of each card is contested, are generally far more protracted than representation proceedings.[20] Moreover, the issuance of such bargaining orders would tend to encourage picketing for recognition, contrary to Congress' objective, reflected in Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), to limit such activity

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[19] In contested representation cases, the median time between the filing of the petition and the decision of the regional director is about 45 days. 37TH *NLRB Annual Rep.* 13 (1972).

[20] The Board's "records show that in the period between January and June 1968, the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days." *Gissel, supra*, 395 U.S. at 611, n. 30. In *Linden*, the time between the filing of the charge and the Board's decision was about 4½ years (Ct. of Appeals App. A–3), and in *Wilder* it was about 6½ years (*Id.* A–1 to A–2).

and encourage instead prompt resort to the Board's election machinery.[21]

c. In *Gissel,* the Court, although sustaining the Board's authority to issue a bargaining order where the union had shown majority status through cards and the employer had engaged in independent unfair labor practices which precluded a fair election, recognized that there was a "category of minor or less extensive unfair labor practices which, because of their minimal impact on the election machinery, will not support a bargaining order" (395 U.S. at 615). If a bargaining order based on cards is not warranted even in some cases where the employer has committed independent unfair labor practices, it would be anomalous to hold that one is nonetheless required where the employer has committed no unfair labor practices.[22]

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[21] The Board's position does not ignore Congress' rejection, in 1947, of an amendment which would have permitted "the Board to find a refusal to bargain violation only where an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9'." *Gissell, supra,* 395 U.S. at 598. Where the employer has engaged in conduct which precludes the holding of a fair election or where he reneges on an agreement to have the union's status determined by another method (n. 18, *supra*), the Board will find a bargaining obligation on an indication of majority status shown other than through a Board election.

[22] Indeed, in *Linden,* the employer committed an independent unfair labor practice which the Board found was insufficient to warrant a bargaining order under the *Gissel* standards (*supra,* p. 7, n. 5). Yet, under the decision of the court below, a bargaining order might be required.

The Board's interpretation of Section 8(a)(5) avoids this anomaly.

3. The court below recognized that it "is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority" (Pet. App. A, p. 44), and that, because of the "difficulties in determining the state of past employer knowledge," it is "conceivable that a restriction of 'independent knowledge' to an agreement to abide by an authentication would be acceptable" (Pet. App. A, pp. 45, 47). The court concluded, however, that the Board could not so restrict the "independent knowledge" test without substituting the requirement that the employer "evidence his good faith doubt as to majority status * * * by petitioning for an election" or voicing "consent to abide by an election ordered on union petition" (Pet. App. A, pp. 47, 46, n. 46). The court's reasons for this conclusion do not withstand analysis.

First, the court, noting that Congress in 1947 authorized employers to file their own representation petitions (Section 9(c)(1)(B), *supra*, pp. 3–4), inferred that the premise of this provision was that "employers could 'test out their doubts as to a union's majority status' by petitioning for an election" (Pet. App. A, p. 47). But the legislative history of Section 9(c)(1)(B) shows merely that this provision was intended to eliminate the "discrimination" against employers which had existed under the prior Board rules, which permitted a union to petition for an election even

though it alone was seeking recognition but permitted an employer to do so only when confronted with claims by two or more unions.[23] There is no indication that this provision was intended to go further and require an employer, who had doubts as to a union's majority status, to petition for an election if he desired to avoid a refusal-to-bargain finding.

Second, the court ruled that, "[w]hen an employer petitions for or consents to [an] election, the election process is expedited," since the employer "would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing" or to "object to a sufficient (30%) showing of majority support" (Pet. App. A, p. 48, n. 48). But since there may be more than one appropriate unit for bargaining purposes, the employer and the union may have legitimate differences of opinion over the unit in which an election should be held. For example, the union may have requested recognition in a small unit, whereas the employer may prefer a larger, but still appropriate, unit.

Should the employer be forced to file a petition, he would doubtless pick the larger unit. It is unlikely that the union would accept that unit, whereupon the employer's petition would be dismissed.[24] Accordingly,

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[23] See S. Rep. No. 105, 80th Cong., 1st Sess. 10–11; 93 Cong. Rec. 3838.

[24] Section 9(c)(1)(B) of the Act states that an employer petition must allege that "one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a)." Since "the question [of representation] is raised only by an affirmative claim of a labor organization that it represents a majority of em-

the union, if it desired an election in the smaller unit, would still have to file its own petition, and the employer would remain free to contest the appropriateness of the unit sought by the union. Moreover, even if the disparity between the units sought by the employer and the union was not sufficient to require dismissal of the employer petition, the time saving envisioned by the court below would occur only if the union were willing to resolve in the employer's favor all questions concerning whether particular individuals or jobs fell within or outside of the unit.[25]

Thus, contrary to the view of the court below, requiring the employer to petition for a Board election would not preclude litigation of significant differences between the parties, or prevent an employer, who sought to delay resolution of the representation question, from drawing his petition so as to elicit objections from the union.[26]

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ployees in an appropriate unit," the Board will dismiss the employer's petition if there is a significant discrepancy between the unit set forth therein and the unit for which the union has requested recognition. *Amperex Electronic Corp.*, 109 NLRB 353, 354. Accord: *Wood Bakery, Inc.*, 97 NLRB 122; *Bowman Bldg. Products Div.*, 170 NLRB 312, 313; *Aerojet-General Corp.*, 185 NLRB 794.

[25] For example, in *Wilder*, the employer contended that 7 technical employees should be included in the unit (n. 8, p. 8, *supra*). It is unlikely that the union, without a contest, would have accepted those 7 employees, for they could have spelled the difference between victory and defeat.

[26] The court erred in suggesting that an employer petition would obviate litigation over the sufficiency of the union's showing of interest. While a union petition, unlike an employer petition, must be backed by a 30 percent showing of employee interest (*supra*, p. 5, n. 4), the sufficiency of such showing is not

4. The question whether an employer, who has not engaged in conduct which would preclude a fair election, violates his bargaining obligation under the Act by declining to accept a union's claim of majority employee support where the union has not been certified in a Board election is a recurrent and important one in the administration of the Act.[27] The decision below would require the entry of a bargaining order not only in cases where the employer has committed no independent unfair labor practices, but also in those where the independent unfair labor practices were not, in themselves, sufficient to preclude a fair election (*supra,* p. 17). Moreover, the potential impact of the decision is heightened by the fact that a union denied a bargaining order by the Board can challenge that action in the court below.[28] In these circumstances, prompt resolution of the issue by this Court is warranted.

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litigable by the parties. *National Labor Relations Board* v. *Savair Mfg. Co.*, No. 72-1231, decided December 17, 1973, dissenting opinion, pp. 7–8, n. 6.

[27] See, e.g., *North Shore Convalescent Home*, 195 NLRB 737, 742; *Electric Wiring, Inc.*, 193 NLRB 1059, 1060–1061; *Seymour Transfer, Inc.*, 179 NLRB 26, 33–34. And see, e.g., *Poughkeepsie Newspapers, Inc.*, 177 NLRB 972, 973; *Schrementi Bros., Inc.*, 179 NLRB 853, 854, 855; *Ridgewood Art Woodcraft*, 181 NLRB 761, 764; *Bill Pierre Ford, Inc.*, 181 NLRB 929, 932–933. Cf. *Sullivan Electric Co., supra; Atlantic Technical Services*, 202 NLRB No. 13, p. 6; 82 LRRM 1467, 1469.

[28] Section 10(f) of the Act, 29 U.S.C. 160(f), provides that any person aggrieved by a Board order "denying in whole or in part the relief sought" may obtain review of that order in the District of Columbia Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY, 1974.

APPENDIX A

J-7115
Truck Drivers Union Local No. 413
and Textile Workers Union

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413 ETC. ET AL., Petitioner

v.

* NATIONAL LABOR RELATIONS BOARD

No. 72-1794

TEXTILE WORKERS UNION, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondents

Petitions for Review of Orders of
the National Labor Relations Board

Decided September 13, 1973

*9-CA-4197; 190 NLRB No. 116
Giannasi/Zirkin

Before: LEVENTHAL and ROBB, *Circuit Judges* and JAMESON,* *Senior United States District Judge* for the District of Montana.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge:* These consolidated appeals raise the question of the scope of an employer's duty to bargain, under Section 8(a)(5) of the National Labor Relations Act, on the basis of authorization cards obtained by the union, in light of NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The cases require review of two orders of the National Labor Relations Board. The factual settings are closely related. We shall set out the background in each case before considering the pertinent legal principles.[1]

*Sitting by designation pursuant to 28 U.S.C. § 294(d)

[1] No. 71-1529 is before the court on petition of Truck Drivers Union Local No. 413 (Truck Drivers) affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to set aside a Board decision refusing to order Linden Lumber Division, Summer & Co., ("Linden") to bargain with the union, 190 NLRB No. 116, June 7, 1971.

No. 72-1794 is before the court on petition of Textile Workers Union of America to review the Board's Second Supplemental Decision and Order, refusing to issue a bargaining order directed against Wilder Manufacturing Co., August 21, 1972, reported at 198 NLRB No. 123.

All parties agree that the Board's finding of facts are supported by substantial evidence. Accordingly, we rely for our statement of facts on the decisions of the Board, 173 NLRB No. 30 (1968), 185 NLRB No. 76 (1970), (Wilder); 190 NLRB No. 116 (Linden Lumber Division, Summer & Co.), and the trial examiner's decisions as adopted.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. *Wilder Manufacturing Co.*

On the morning of October 12, 1965, representatives of the Textile Workers presented Walter Derse, secretary and general manager of Wilder, with 11 signed and two unsigned union membership cards[2] and requested recognition as bargaining agent of the Company's production and maintenance employees. Of the 30 employees then on the Company's payroll, 18 were in the production and maintenance unit, which the Board found to be appropriate for purposes of collective bargaining.[3] Failing to receive an

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[2] The cards were signed at the home of William Hissam, a representative of the Union, on the evening of October 11. The card contained the following language:

> "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said [Union] as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment." (JA at 11.)

[3] In the amended complaint, the General Counsel alleged that the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is "All production and maintenance employees of Respondents, employed at its Port Jarvis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act." (JA at 12.)

By consent of all parties 18 employees were included in a unit of production and maintenance employees. The General Counsel and the company disagreed as to whether seven additional employees should be included in that unit. The Trial Examiner found that two of the contested employees were supervisors, and that the other five employees lacked "a community interest" with the production and maintenance employees. (JA at 12-17).

immediate answer to the request, the eleven employees who had signed the authorization cards left the plant and established a picket line. They were joined the next day by the two employees whose blank cards were among the thirteen presented to Derse.[4]

During the evening of the next day, October 13, the Company's officers met. Walter Derse reported that there were ten or eleven employees on the picket line and as "we are about 30 (not including the officers of the Company) it appears that they do not represent a majority." The officers decided not to recognize the union.[5] The picketing continued for at least five months thereafter. Subsequent demands for recognition were made without response from the Company.

On May 9, 1966, the Board's General Counsel filed a complaint charging Wilder with violations of § 8(a)(1) and (5) of the Act.[6] The Trial Examiner, on September 22,1966,

[4] As the Trial Examiner noted, as the company's proposed unit was 25 employees, "it is apparent that the Union on October 12, 1965, held valid authorization cards (13 in number) for the majority of the employees in such unit."

[5] As reported by the Trial Examiner, Derse included all the employees in the thirty

"because . . . what Mr. Cohen [a union representative] told me was that they represented a majority of our employees."... [T]he Trial Examiner has found that the Union requested representation in a production and maintenance unit thus there was no basis for Derse's assertion that the Union desired to represent all thirty employees. Moreover, the Trial Examiner is not convinced that Derse was so unschooled in labor matters as to believe that the Union was seeking to represent Plant Manager Mr. Carlin, Supervisor DeGraw, or the office clerical employees whom the employer conceded should be excluded from the appropriate unit. Furthermore at the time Derse's remarks were claimed to have been made, he was aware that only production and maintenance employees had joined the strike. (JA at 19 n. 35).

[6] As to the 8(a)(1) charge, the complaint alleged that certain statements by a supervisor violated the § 7 rights of Wilder employees. This unfair labor practice charge is not before the court.

upheld the complaint on the § 8(a)(5) and dismissed the 8(a)(1) charge.[7] The Board, however, concluded that the 8(a)(5) charge should be dismissed since "there is no showing whatsoever that Respondent had rejected the collective-bargaining principle or engaged in any interference, restraint, or coercion of employees to undermine the Union. Nor does the record show that Respondent has engaged in any other conduct which would prevent the holding of a fair election."[8] On petition for review to this court, we held per curiam, 137 U.S.App.D.C. 67, 420 F.2d 635 (Nov. 14, 1969), that in light of the intervening *Gissel* decision, *supra*, and possible conflicts between the "current practice" of the Board, as represented to the Supreme Court, and the decision reached, the case should be remanded for "further consideration by the Board in the first instance in light of *Gissel*, but without limitation."[9]

[7] The designation of the valid 8(a)(1) charge was only in connection with the failure to bargain under 8(a)(5), thus not constituting an independent unfair labor practice.

[8] In so holding the Board acknowledged that proof of "bad faith" would be a basis of a valid 8(a)(5) violation, but equated this with evidence that the "Employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the Union and dissipate its majority." (J.A. at 6).

[9] 137 U.S.App.D.C. at 68, 420 F.2d at 636. The court noted specifically that the defense advanced by the employer, that it did not think the cards presented to it represented a majority of the appropriate unit, seemed inconsistent with the Board's position in *Gissel*, where the Board represented to the Court at oral argument that "an employer could not refuse recognition initially because of questions as to the appropriateness of the unit." 395 U.S. at 594. Judge Fahy, concurring separately in the per curiam, stated (137 U.S. App. D.C. at 70, 420 F.2d at 638):

> The present record reveals that the Union representatives had authorization cards free of suspicion from a majority in a unit recognized as appropriate by the trial examiner and the Board, followed by evidence of the majority's solidarity through the picketing and strike. Moreover, the employer did not demand that the Union request a Board election.

On August 27, 1970, 185 NLRB 175, the Board issued a Supplemental Decision and Order, after a review of the entire record, and now found that Wilder's course of conduct did constitute a violation of § 8(a)(5). In reaching this result the Board declined to rest on a finding that the case presented an employer who refused to bargain and "stands upon his doubt as to the appropriateness of the unit," stating that "the Respondents' response – or lack of response – to the Union demand did not assert this as the ground of the refusal . . . ."[10] Instead the Board focused on these findings: (1) There was evidence, in addition to mere cards, sufficient to communicate to the employer convincing knowledge of majority status (the independent knowledge test). (2) The evidence was insufficient to show that the employer's refusal to grant recognition was based upon genuine willingness to resolve any doubts concerning majority status through the Board's election process. On finding both these conditions met, the Board concluded that the refusal to bargain constituted a violation of 8(a)(5).[11] The Board then filed an

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[10] The Board, in note 4 of its supplemental decision, stated:

"The Respondents did later contend before this Board that certain additional employees should be added to the Union's proposed unit. We have, however, in other cases been required to resolve such unit questions in 8(a)(5) cases and, upon making a finding of appropriate unit, then proceeded to direct the respondent to bargain in the unit ultimately found appropriate . . . . Generally, of course, any such doubts are best resolved in the course of representation case procedures which any party is free to invoke. As we note *infra*, the Respondents here made no attempt to resolve any doubts as to appropriateness of unit by this method." (JA 34).

[11] The Board attributed "independent knowledge" to the employer on the basis of (a) 11 of 18 production and maintenance employees had signed cards, (b) all of the card signers went on strike, and (c) "an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union 'had 10 or 11' of the employees."(JA at 35.)

application for enforcement of its supplemental order in this court on September 21, 1970. While the petition was pending, the Company moved to dismiss this petition on jurisdictional grounds, and subsequently the Board moved to have the case remanded to it for reconsideration in light of its decision in *Linden Lumber*, 190 NLRB No. 116, 77 LRRM 1305 which issued on June 7, 1971 and is the companion case in this litigation. Our court upheld the jurisdictional objections of the company and transferred the case to the Second Circuit,[12] which on February 1, 1972, remanded to the Board for the requested reconsideration.[13]

The Board on August 21, 1972, 198 NLRB No. 123, then issued its Second Supplemental Decision and Order in *Wilder* which reversed the First Supplemental Decision and Order. The Board, one member dissenting, rejected the "independent knowledge" test and held that absent voluntary measures by the employer, through an attempt[14] or agreement[15] to

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As to the second condition, the Board noted that "the Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures." (JA at 35) Also the Board rejected Respondent's contention that the provisions of 8(b)(7)(c) supported its position that an election was required because picketing for recognition is unlawful if "conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." The Board relied on Blinne Construction Company, 135 NLRB 1153 (1962) as rejecting that construction of the statute where a union strikes and pickets against an employer's unlawful refusal to recognize it and meritorious 8(a)(5) charges have been filed. (JA 37).

[12] ___ U.S.App.D.C. ___, 454 F.2d 995 (1971).

[13] JA at 104.

[14] Citing Nation-wide Plastics, 197 NLRB No. 136 (1972).

[15] Citing Snow & Sons, 134 NLRB 709, enf'd 308 F.2d 687 (9th Cir. 1962).

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determine majority status by any means other than a Board election, and in the absence of any independent unfair labor practices, the predicate could not be established for an 8(a)(5) violation.[16] After over 7 years, and three Board decisions representing a series of reversals in position, the Board now seeks to limit sharply the scope of any duty to bargain on the basis of authorization cards.

B. *Linden Lumber*

The procedural history of *Linden Lumber* is shorter – there is only one Board decision – but pointed, for it is on the basis of the Board's decision in this case, issued June 7, 1971, that the decision in *Wilder* rests. The time elapsed since the underlying events, however, is more than six years.

On December 28, 1966, employee Martin contacted Local 413 representative Dow Norman about organizing the employees of Linden Lumber (the Company). Next day, Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. In the proceeding before the Trial Examiner, "the

[16] The Board was of the view that no workable standard could be developed to evaluate whether an employer "knows" or "doubts" majority status, nor would it determine the "willingness" of the employer to have majority status determined by the election process. Moreover, the Board emphasized the "preferred status" of the election process. It concluded:

> We think it far better, by making clear here, as we did in *Linden*, that the proper course in such cases is for the union, on behalf of the employees, to invoke our election processes. In that manner, if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks. Surely this is a far better basis for the bargaining relationship than a decision in litigation which would take us nearly a year to reach and which, even then, may be subject to debate as to the soundness of its evidentiary base and to further contest in the courts. (JA at 110).

parties stipulated that at all times material there were 10 employees" within the appropriate bargaining unit.[17] On January 5, 1967, Local 413 ("the Union") sent a letter to the Company requesting recognition. On February 3, at a prehearing conference on the Local's representation petition, the Company declined the Union's request to enter into a consent election agreement. Instead the Company raised threshold questions as to the Union's showing of interest, on the basis that the union had been organized by supervisors (Marsh and Shafer).[18] Based upon the Company's alleged fear of recognizing a supervisor-dominated union, the Company stated that unless it could settle the 8(a)(2) violation in the context of the petition for an election -- a request refused by the hearing officer – it would refuse to recognize the union,

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[17] There was agreement that the following unit was appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yardmen . . . excluding office clerical employees, guards and supervisors. (JA at 73)

Initially there was a dispute over the inclusion of three alleged supervisors in the unit, but the parties agreed that one, a Mr. Toops, was a supervisor. As to Marsh, the trial examiner found he was not a supervisor. Since Shafer resigned on February 6, 1965, the Trial Examiner determined it was unnecessary to decide whether he was, in fact, a supervisor. (JA at 73-74)

Thus, the Examiner determined there were 11 legitimate employees in the actual unit. Eliminating the vote of Shafer, every member of the appropriate unit signed an authorization card.

[18] The employer had reference to a possible 8(a)(2) violation which prescribes employer domination of unions.

even after a Board-conducted election.[19] Immediately aft this statement by the representative of the Company (M Rector), the Union's representatives withdrew the representati petition.[20] After the withdrawal was approved, Rector to Mr. Smedstad, the Union attorney, that if the Uni submitted a new petition supported by a "fresh" 30 perce showing of interest, the Company would go to a conse election. By March 4, the Union had obtained 9 signatur (leaving out the two alleged supervisors, Shafer and Marsh The Company still refused to recognize the Union "because it membership included supervisors who influenced employees again raising the spectre of the 8(a)(2) violation.

On February 15, the employees struck in support of th Union demand for recognition.[21] The Union filed its charg of refusal to bargain on February 23, and the strike ended o

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[19] The Hearing Officer ruled that Linden's claim of supervisor influence in organization of Local 413 related to the Union administrative showing of interest (Board Rule 101.18) and could not b litigated at a representation hearing. (See JA at 46.)

The Trial Examiner subsequently found, in the hearing on th 8(a)(5) charge, that in fact there were no supervisors in the bargainin unit.

[20] The Trial Examiner found, on the basis of cross-examination o the union's counsel, that this was done to avoid two years of litigatio The sequence, of course, would be the order of an election; if the unio wins, the employer resists recognition; the General Counsel brings a 8(a)(5) violation. The union sought to short-circuit this proceeding b moving directly to an 8(a)(5) proceeding, a strategy facilitated by th complaint of the General Counsel. Obviously the union attorney did no anticipate, nor could he, that the question of recognition would still b unsettled in 1973.

[21] Initially, Marsh did not join the strike on union instructio because his status as a supervisor was in question. On February 2 Marsh ceased work, apparently joining the strikers.

June 1. At the end of the strike the Company refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of the Company's belief that he had provoked and participated in a violent incident related to the picketing at the plant.

On these facts, the Trial Examiner concluded that the Company violated Section 8(a)(5) by refusing to recognize the Union, that the strike was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3).

The Board concluded that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3). It further determined, two members dissenting, to reject the Examiner's conclusion, and held that the Company did not violate § 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

The Board majority began its analysis by noting that the § 8(a)(3) violation did not amount to a serious independent unfair labor practice, and that it could not make a finding that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ." (*Gissel, supra,* at 614-15). This conclusion is not challenged in this petition for review.

Noting that *Gissel* left open "whether, absent election interference, an employer who insists on an election must initiate the election by his own petition," the Board reviewed

the "current practice" on this question alluded to in *Gissel*.[22] The Board then questioned whether the Supreme Court summary "is entirely accurate," particularly whether the Board had ever used the "independent knowledge" test as a basis for a bargaining order. It stated that *Snow & Sons*, 134 NLRB 709, *enf'd*, 308 F.2d 687 (9th Cir. 1962) did not rest only on the fact of employer *knowledge*, but "also upon the fact that the employer breached his agreement to permit majority status to be determined by means other than a Board election." The Board also distinguished its decision in *Wilder*,[23] observing "[t]here we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures." The Board then argued that the "independent knowledge" test was unworkable, and also questioned how it could determine the "willingness" to have majority status

[22] The Court stated, 395 U.S. at 594:

> Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election process and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an after-thought, that he doubted the union's strength.

[23] At this time, the second Board decision, finding an 8(a)(5) violation, was in effect.

determined by an election. The Board stated, "how are we to judge 'willingness' if the record is silent, as in *Wilder*, or doubtful, as here, as to just how 'willing' the Respondent is in fact? We decline, in summary to re-enter the 'good faith' thicket of *Joy Silk* . . . . "[24] The Board indicated that it intended to restrict the scope of § 8(a)(5) to those situations in which the company and union had "voluntarily" agreed "upon [a] mutually acceptable and legally permissible means, other than a Board-conducted election, for resolving the issue of union majority status."

C. *Contentions of the Parties*

The petitioner unions contend that the language and history of §§ 8(a)(5) and 9(a), and subsequent court decisions, establish that an employer has a duty to bargain whenever the union representative presents "convincing evidence of majority support," that this requires an evaluation of whether "a reasonable man" would consider any particular evidence convincing, and that such convincing evidence was supplied in the instant cases by the recognitional strikes, joined by a majority of their employees. They submit that retention of an independent knowledge test is not inherently unworkable, at least when knowledge is determined on the basis of a recognitional strike.

The Board, on the other hand, has adopted a "voluntarist" view of the duty to bargain. Absent unfair labor practices or an agreement to determine majority status through means other than an election, such as a poll, the employer has no duty to recognize the union. This means, in effect, that as a matter of law, the decision to recognize a union on the basis of cards is entirely within the control of the employer; neither "bad faith" or "independent

[24] Joy Silk Mills, Inc., 85 NLRB 1263, enf'd as modified 185 F.2d 732 (D.C. Cir. 1950).

knowledge" can lay the predicate for recognition because those concepts are deemed unworkable.

II. THE STATUTORY FRAMEWORK

While there is certainly wide latitude for Board policy in enterpreting the requirements of statutory obligations, "The policy of Congress . . . cannot be defeated by the Board's policy," Machinists Local 1424, 362 U.S. 411, 429 (1960). We therefore begin with a brief examination of the legislative materials.

Section 9(a) provides that: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . . . . " Section 8(a) (5) then provides that it shall be an unfair labor practice for an employer "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." *Gissel*, aside from its specific holdings,[25] is important in recognizing that:[26]

> Since § 9(a) . . . refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."

The view that an election was not the only predicate for a union claim to majority status is given added emphasis by the Conference Committee rejection of that proposal when the basic Act was under revision in 1947. The House version

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[25] The Supreme Court left open the issue presented in the instant cases. 395 U.S. at 595 and 601 n.18.

[26] 395 U.S. at 596.

of § 8 (a)(5) would have made a refusal to bargain an unfair labor practice only if the union were already certified under § 9(a). This was rejected in favor of the broader Senate version.[27] The language was not changed as the House proposed, even though, as *Gissel* points out, it had been early recognized, by interpretation of the outstanding law, that the employer had a duty to bargain whenever the union representative presented convincing evidence of majority support.

What Congress did do in 1947 was to add a provision, in § 9(c)(1)(B), to give employers the right to file their own representation petitions. It provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board – . . . .
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

These statutory provisions plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election. There is no clear cut answer, however, either in the text of the statute or the legislative history, to the question of when and in what circumstances an employer must take evidence of majority support as "convincing." That is the focal issue of these cases.

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[27] *See* H.R. 3020, 80th Cong., 1st Sess. (1947) (House Bill). The Conference Report, H.R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947) stated: "The conference agreement . . . follows the provisions of existing law . . . in the case of section 8(5) . . . which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

III. STANDARDS FOR CARD RECOGNITION

In approaching the question of a possible standard f
card recognition, we must begin by recognizing that "car
are not the functional equivalent of a certificati
election,"[28] and elections have a "preferred status" as
means of determining representation.[29] Three reasons a
primary in the Board's conclusion that cards do not have t
same standing as certification election. (1) There is great
opportunity for coercion of employees by union organizers,
compared with a secret ballot.[30] (2) Arguably, employe
may misunderstand the import of signing an authorizati
card, because of misreading, failure to read, or unio
misrepresentation.[31] (3) When cards are used, the employ
has no opportunity to speak to his employees concerni
their determination to have union representation, and
employer's right to communicate to employees concerni
representation is arguably guaranteed under § 8 (c) of t

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[28] Comment, Employer Recognition of Unions on the Basis
Authorization Cards: the "Independent Knowledge" Standard, 39
Chi. L. Rev. 314, 318 (1972).

[29] The Court in *Gissel* noted that "secret elections are generally t
most satisfactory – indeed the preferred – method of ascertaini
whether a union has majority support." 395 U.S. at 602.

[30] Comment, *Refusal-to-Recognize Charges Under Section 8(a)(5)*
the NLRA: Card Checks and Employee Free Choice, 33 U. Chi. L. Re
387, 390 (1966). While this argument certainly has force on its fac
its force is presumably subject to discount for the ability of unio
organizers to effectively influence votes in election campaigns.

[31] *See* Note, *Union Authorization Cards*, 75 Yale L. J. 805, 82
Cf. Lesnick, *Establishment of Bargaining Rights Without an NLR
Election*, 65 Mich. L. Rev. 851 (1967).

Taft-Hartley Act.[32] Out of these considerations arises an inhibition on the part of the Board to expand the mandatory scope of a duty to bargain on the basis of cards.

A. *The Independent Knowledge Standard*

Prior to the present litigation, the Board implemented the policy favoring elections over cards by adopting a limited scope for a duty to bargain in the absence of election. The rule adopted by the Board has been described as the "independent knowledge" standard.[33]

This rule developed from the case of *Snow & Sons*[34] where the employer, upon being presented with an apparent card majority, at first refused to recognize the union and insisted that it petition for an election. Subsequently, the employer agreed to submit the cards to an impartial third party, but after authentication, the employer refused recognition claiming he never considered the agreement binding. The Board held that, given the authentication, the refusal to bargain was not based on a reasonable doubt as to the union's majority. During the 1960's the *Snow & Sons* doctrine was applied where an employer had reneged on an agreement to have the cards authenticated by an impartial party and to be bound by such authentication.[35]

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[32] Courts have protected the employer's right to influence the vote of his employees through non-coercive speech. *See* Thomas v. Collins, 323 U.S. 516, 537-38 (1945); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941); Suprenant Mfg. Co. v. NLRB, 341 F.2d 756 (6th Cir. 1965).

[33] Comment, note 28 *supra*, at 319.

[34] 134 NLRB 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

[35] Lesnick, *supra* note 31, at 852.

We interject to note that at this time - prior to *Gissel* i 1969 - the applicable doctrine defined an employer's right o non-recognition as applicable only in case of a "good faitl doubt as to the unions' majority status." Joy Silk Mills, Inc v. NLRB, 87 U.S. App. D.C. 360, 185 F.2d 732 (1950) Retail Clerks Union, Local No. 1179 v. NLRB, 376 F.2d 18((9th Cir. 1967). In *Gissel*, the Board announced "at ora argument that it had virtually abandoned the *Joy Sil* doctrine altogether."[36] The Court further stated th Board's position at that time (395 U.S. at 594):

> Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long a he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew* through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

Subsequent to *Gissel*, two Board decisions expanded on the *Snow* rationale. In *Pacific Abrasive*,[37] presentation of the

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[36] The "good faith" doubt test of *Joy Silk* had been widely criticized as plunging the Board and courts into a search for subjective intent. *See* Christensen & Christensen, Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recognition of Unions Under the NLRA, 37 U. Chi. L. Rev. 411 (1970). It is one thing to abandon a subjective standard used to determine when employers are required to recognize on the basis of cards and replace it by the alternative, and arguably more objective, standard of "independent knowledge". That was the Supreme Court's understanding in *Gessel*. It is another thing to abandon any standard.

[37] 182 NLRB 329, 74 LRRM 113 (1970).

card majority was accompanied by the employer's verification of the signature on the cards, an acknowledgement of authenticity, conversations with employees who indicated union support, and a strike in support of recognition by a majority of the unit. The Board was thus relying on conduct of the employer or employees, in drawing the inference that the employer must have known that the union had a majority.[38] *Pacific Abrasive* was followed by the second decision in the instant case, *Wilder*, where the Board established "independent knowledge" on the basis of evidence in addition to mere cards, sufficient to communicate to the employer "convincing" knowledge of majority status.[39] In the Board opinions now before us for review, the Board has retreated to the facts of *Snow & Sons*, the fact of an agreement to be bound by an independent authentication, as offering the only valid basis for an employer duty to bargain on the basis of "independent knowledge." Thus, "[u]nless, as in *Snow & Sons*, the employer has agreed to let its 'knowledge' of majority status be established through a means other than a Board election" (JA at 53-54) the facts will not justify an 8(a)(5) bargaining order.

It is important to understand, however, that it was represented to the Supreme Court in *Gissel* that the facts of *Snow & Son* laid the predicate for a finding of independent

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[38] Comment, *supra*, note 28, at 321.

[39] The Board relied on the following facts in finding "independent knowledge":

> In the instant case, the record demonstrates not only that 11 out of 18 production and maintenance employees had signed authorization cards, but also that all of the card signers dramatically evidenced their support for the Union by actively participating in a picket line and in a strike, and furthermore, that an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union "had 10 or 11" of his employees.

knowledge, not that a finding of "independent knowledge" was restricted to such facts.[40] The Board in its decision questions whether the Supreme Court accurately summarized its position.[41] This is not just a matter of historical detail inherent in the two positions is a difference which goes to the heart of the Congressional policy established by the statute.

The abandonment of *Wilder II* means that even if an employer acts in total disregard of "convincing evidence of majority status," he has no duty to recognize a union. That duty can only be triggered by his own permission, in allowing an impartial party to assess union strength.

There were a number of indices in both *Wilder* and *Linden Lumber*, which could have laid the predicate for "convincing evidence of majority status"; in *Wilder*, there was a strike in support of the cards, and an admission of Respondent that the Union had "10 or 11" of his employees; in *Linden Lumber*, there was a recognitional strike, and a renege on the employer's agreement to abide by an election outcome after a "fresh" showing of a thirty percent support. The Union argues that these facts necessarily lay the foundation for a bargaining order.

Recognitional Strikes Not Necessarily Predicate for 8(a)(5) Bargaining Order

As to recognitional strikes in support of a card majority, we do not think prior cases establish this a conclusive showing of "convincing evidence." Petitioners place primary reliance on United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956), but that case merely established that a state court could not enjoin a recognitional strike where there was a card majority, solely because the union had failed to take

[40] *See* 395 U.S. at 594, quoted above.

[41] JA at 53.

necessary steps toward securing a Board election. The issue as to whether a recognitional strike laid the foundation for an 8(a)(5) charge was not before the court.[42] While there are circuit court decisions indicating that a strike supported by a unit majority undermines a good faith claim of doubt as to majority status, these cases are distinguishable.[43] There is no case holding that the statute requires the Board to use recognitional strikes as conclusive evidence, and it is that position for which the union contends.

Even assuming some test such as "independent knowledge" is required by the statute, that does not mean the

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[42] Petitioners point to the following passage in *Gissel*, 395 U.S. at 596-97, as establishing the Court's acceptance of recognitional strikes as necessarily showing convincing support:

> Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligations; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5) – by showing convincing support, for instance, by a union called strike or strike vote, or as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11] [Footnote omitted.]

However, this passage merely begs the question here at issue, since the Court was simply using strike votes and cards as alternatives. Not even the union contends here, nor has it ever been Board practice, that a card majority *per se* invokes a duty to bargain. This is given added emphasis by footnote 11 to the above cited passage from *Gissel* which reads:

> The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the Administration of the Act, see NLRB v. Remington Rand, Inc., 94 F.2d 862, 868 (C.A.2d Cir.), cert. denied, 304 U.S. 576 (1938).

[43] *See, e.g.*, NLRB v. Harris-Woodson Co., 179 F.2d 720 (4th Cir. 1950) (recognitional strike, in context of refusal to negotiate with an already certified unit); NLRB v. National Seal Corp., 127 F.2d 776 (2d Cir. 1942) (recognitional strike accompanied by independent unfair labor practices, and anti-union animus of predecessor corporation.

Board must attach conclusive weight to recognitional strikes. As the Court described the role of the Labor Board in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945), "One of the purposes which lead to the creation of such boards is to have decisions based upon evidentiai facts under the particular statute made by experienced officials with an adequate appreciation of the complexitites of the subject which is entrusted to their administration." It is certainly permissible for the Board to avoid encouraging recognitional striking and picketing by refusing to regard them as an independent and conclusive method of demonstrating a majority, particularly since workers might well honor a picket line without necessarily supporting the union.[44]

Other Evidence of Majority Support

Aside from the fact that in *Linden Lumber* the employer refused to acknowledge the "fresh" showing of majority support – which we deal with below in a different context – the only other indication of majority support was the admission of the employer in *Wilder* to other officers of the Company, that the Union "had 10 or 11 of his employees." While the Second Supplemental Decision of the Board did not comment directly on this evidentiary point, relied upon in its First Supplemental Decision, disregard of this evidence was apparently related to the Board's rejection of "the wisdom of attempting to divine, in retrospect the state of employer (a) knowledge, depicting this as re-entry into the "good faith thicket." We assume the "10 or 11" statement was made by the employer, for the Board seemingly does not contest this prior Board finding. While it may be that there

[44] Refusal to cross a picket line may reflect mere fear, *see* NLRB v. Union Carbide Corp., 440 F.2d 54, 56 (4th Cir. 1971), *cert. denied*, 404 U.S. 826 (1971). Or it may reflect a respect for what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative.

would be difficulties in determining the state of past employer knowledge, in this case and in others, we cannot accept the view that this requires a union petition for an election as the only means for obtaining recognition. We turn, at this juncture, to another predicate for issuing a bargaining order, related to "independent knowledge" and its "good faith" predecessor: the failure of the company to evidence its own "good faith doubt" by itself petitioning for an election.

B. *Failure of Employer to Petition for Election as Pertinent to "Good Faith"*

In *Gissel*, the Court reviewed the legislative history of § 9(c)(B) of the 1947 Taft-Hartley Amendments. The Supreme Court stated, 395 U.S. at 599:

> That provision was not added, as the employers assert to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity [footnote 16 omitted].

In footnote 16, the Supreme Court noted that the Senate Report clearly indicates that the right to petition for an election was a way in which the employer could remove his doubt.[45] Neither Wilder nor Linden indicated that it wishes to have a doubt resolved by petitioning for an election. In the First Supplemental Decision in *Wilder*, two reasons were given

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[45] As the Supreme Court noted, Senator Taft stated during the debates:

> Today an employer is faced with this situation. A man comes into his office and says "I represent your employees. Sign this agreement, or we strike tomorrow". . . . The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board . . . and say "I want an election. I want to know who is the bargaining agent for my employees."

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for finding a violation of the duty to bargain. Besides holdin that the employer had "independent knowledge" of th union's majority statute, the Board found that there wa "insufficient evidence that the employer's refusal to gran recognition was based upon genuine willingness to resolve an doubts concerning majority status through the Board election process," noting that "the Employer did not itse file an election petition or urge or even suggest to th employees or the Union the use of such procedures."

In *Linden*, of course the union did file a petition for a election simultaneous with its demand for recognition. Th employer, however, after refusing to recognize on the basis o cards, indicated that he would not recognize the union even i it were victorious in an election. This led the Union t withdraw their petition and go straight to the 8(a)(5 proceeding, which was inevitable, in any event, at the end o the election process.

Of course, in *Linden*, the Board indicated that this fac would play no part in its decision since it was reassessing "th wisdom of attempting to divine, in retrospect, the state o employer (a) knowledge" and "(b) intent at the time h refuses to accede to a union demand for recognition." Th Board went on to state " . . . if we are to let our decision turn on an employer's 'willingness' to have majority statu determined by an election, how are we to judge 'willingness if the record is silent, as in *Wilder*, or doubtful, as here, as t just how 'willing' the Respondent is, in fact."

Whatever the merit of abandoning the "independen knowledge" doctrine because of the difficulty of reachin judgments required as to state of mind, the same cannot b said as to "willingness to have majority status determined by an election." One simple act, a petition by the employer fo an election,[46] could evidence such "willingness." Indeed i

[46] Or an employer's voicing of a consent to abide by an electio ordered on union petition.

was the premise of the Taft-Hartley Amendment to § 9(c)(B) that employers could "test out their doubts as to a union's majority status" by petitioning for an election. In ignoring that opportunity, the Board ignores the very intent behind the statutory provision.

It is our view that the Board order cannot be enforced where both tests have been abandoned. It is conceivable that a restriction of "independent knowledge" to an agreement to abide by an authentication would be acceptable, if the employer was required to evidence his good faith doubt as to majority status, by petitioning for an election. The Board, on the other hand, is willing to resolve every assertion of doubt in the employer's favor, without permitting any "test" of those doubts. The union, of course, argues that an employer would violate § 8(a)(5) by petitioning for an election without entertaining actual doubt. This is, however, an issue we need not reach.

While we have indicated that cards alone, or recognitional strikes and ambiguous utterances of the employer, do not necessarily provide such "convincing evidence of majority support" so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require an employer asserting a doubt of majority status to resolve the possibility through a petition for an election, if he is to avoid both any duty to bargain and any inquiry into the actuality of his doubt.[47]

[47] The Board might, in order to reduce litigation and delay in these matters, adopt the rule that an employer must, when presented with an authorization card majority, either recognize the union or, within a reasonable time, petition for a certification election. Comment, *supra* 28, at 325. Without such a *per se* rule, of course, the Board would have to use some version of the "independent knowledge" test it considers workable, in order to define those conditions where a failure of an employer to petition for an election would be a predicate for an 8(a)(5) bargaining order.

When an employer petitions for or consents to election the election process is expedited.[48] If he declines to exercise this option, he must take the risk that his conduct as a whole, in the context of "convincing evidence of majority support," may be taken as a refusal to bargain.

As is only too often the case in litigation trenching on deep feelings, each of the parties focused on its extreme position – the unions, on their claim to an 8(a)(5) order based on an "independent knowledge" test retained in full

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[48] Board member Fanning, dissenting in the Second Supplemental Decision in *Wilder*, observed that:

> [O]ur experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.

One commentator, on the basis of an interview with Martin Schneid, Assistant to the Regional Director, NLRB, has concluded that "an election contested through submission of objections at a pre-election hearing is likely to take sixty to sixty-three days between petition and balloting, while a consent election, in which the hearing is waived, is likely to take only twenty to twenty-three days. Comment, *supra* note 28, at 325 n.48.

The additional speed is obtained by the ability to dispense with objections at a prehearing conference. If an employer files a petition for an election, he would be required to define the appropriate unit and therefore would not be entitled, as an objecting party, to request a hearing. Nor could the employer object to a sufficient (30%) showing of majority support.

The direct consequences of such a rule are immediately apparent in the context of *Wilder* where the employer challenged the appropriateness of the unit – this was, in fact, an asserted reason for not recognizing the union on the basis of cards – and in *Linden Lumber* where the employer raised his possible § 8(a)(2) liability for recognizing a union dominated by supervisors, as well as connected unit problems. Yet the trial examiners in both cases found there was no basis for such concerns, thus indicating how such issues may be used to delay elections.

flower; the Board and the companies, on their claim that an 8(a)(5) obligation can flower only in case of employer consent to authentication. And so the position set forth in this opinion was not advanced by the parties. It was presented by the court during the course of argument, and counsel had an opportunity to develop whatever objections were seen. If objections had subsequently been visualized, leave to file a post-argument memorandum could have been sought, and properly so. Hearing no such objection, and seeing none ourselves on further reflection[49], we conclude the principle herein set forth is sound.

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[49] We take note of the possibility that an employer may contend that he does not want to petition for an election because he fears that an agreement with the certified union may be challenged as a "sweetheart" deal prohibited by § 8(a)(2). Such a contention is more likely to reflect a tactic than a genuine problem. This seems to have been the case in *Linden*, where the employer first objected to the Union petition for election on the ground of inclusion of supervisors in the unit, then promised to proceed with a consent election if the Union made a fresh start, yet later objected to a new Union showing of interest on a petition for election established without cards from the challenged persons, on the ground that the problem was not remediable.

In any event, to the extent that an employer's petition for election may be followed by an issue under § 8(a)(2), on a "sweetheart" objection, this is a modest and limited difficulty which was accepted by Congress as an objection lacking sufficient significance to override the value of employer petitions in arriving at labor peace and resolution of problems.

Of course, the possibility exists – indeed it was raised in *Linden Lumber* – that the employer would be subject to an 8(a)(5) violation if he did not recognize a union, but subject to an 8(a)(2) charge if he did, and it was later found that the Union was employer-dominated. This possibility is significantly increased, it could be argued, by taking away the possibility of raising the 8(a)(2) defense to a union election petition, as a self-protection measure of the employer. *See* International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731 (1961). One possible reply to this dilemma is that it is less of a problem following an election, as compared to the situation which would exist if the only option was card recognition. *See id.* at 739; *Compare* Shea Chemical Corp., 121 NLRB 1027 (1958).

IV. CONCLUSION

We hold that if "independent knowledge" is to b restricted, some alternative must be put in its place to preven an employer's deliberate flouting and disregard of union card without rhyme or reason. The complete lack of such a alternative would not be consistent with the Act. If n "independent knowledge" or "good faith" test is to be use by the Board, the employer must be put to some other kin of test to evidence good faith. *Compare* Food Stor Employees Union v. NLRB, 476 F.2d 546, 554 (D.C. Cir 1973). The alternative such as employer petition for electio retains primary emphasis on the election process, and it preferred status. The position adopted by the Board i inconsistent with the Act and its orders must be reversed. We remand to the Board to reconsider what option, consisten with the statute, it wishes to follow.

Reversed and remanded.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

September Term, 1972

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC, ET AL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 72-1794

TEXTILE WORKERS UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS

PETITIONS FOR REVIEW OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Before LEVENTHAL and ROBB, Circuit Judges and JAMESON,* Senior United States District Judge for the District of Montana

(Filed September 13, 1973)

JUDGMENT

These causes came on to be heard on petitions for review of orders of the National Labor Relations

*Sitting by designation pursuant to 28 U.S.C. § 294(d).

Board and were argued by counsel. On consideration of the foregoing, it is

Ordered and adjudged by this Court that the orders of the National Labor Relations Board appealed from in these causes are hereby reversed and these cases are hereby remanded to the National Labor Relations Board in accordance with the opinion of this Court filed herein this date.

Per Curiam.
For the Court:
HUGH E. KLINE,
Clerk.

Date: September 13, 1973.

Opinion for the Court filed by Circuit Judge Leventhal.

By MARY MATEIN, *Deputy Clerk.*

United States Court of Appeals for the District of Columbia Circuit

September Term, 1973

No. 71-1529

TRUCK DRIVERS UNION LOCAL NO. 413, ETC., ET AL., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 72-1794

TEXTILE WORKERS UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before LEVENTHAL and ROBB, Circuit Judges; and JAMESON*, United States Senior District Judge for the District of Montana

(Filed November 6, 1973)

ORDER

On consideration of petitioners' motion to amend mandate, and of the opposition of applicant Intervenor to petitioners' motion to amend mandate, it is

Ordered by the Court that the motion is granted and the judgment filed herein on September 13, 1973 is amended by adding the following paragraph thereto:

The Court retains jurisdiction of this matter.

Per Curiam.

For the Court:

HUGH E. KLINE,
Clerk.

By MARY MATERN, *Deputy Clerk.*

*Sitting by designation pursuant to Title 28, U.S.C. § 294(d).

APPENDIX C

United States of America Before the National Labor Relations Board

Cases 9—CA—4197; 9—CA—4283; 9—CA—4309

LINDEN LUMBER DIVISION, SUMMER & CO., and TRUCK DRIVERS UNION LOCAL NO. 413, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On January 26, 1968, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof. The Charging Party filed an answering brief.

Thereafter, by Order of April 15, 1968, the National Labor Relations Board remanded the proceeding to Trial Examiner Peterson to consider further Respondent's defense to the 8(a)(5) allegation, by making findings of fact concerning (1) the supervisory status of Shafer and (2) if a supervisor, the impact of Shafer's conduct on the validity of the Union's card majority; and for making any other or additional findings based on the record as supplemented, if necessary, by evidence received at a reopened hearing.

On April 26, 1968, the Trial Examiner issued his Supplemental Decision, also attached hereto, making findings in accord with the remand. He concluded that it was unnecessary to take additional evidence because the existing record established that Shafer was a supervisor and that Shafer did not taint the Union's majority by either signing a card or any other conduct. The Trial Examiner also indicated that he would adhere to the findings, conclusions, and recommendations contained in his original Decision of January 26, 1968. Thereafter, Respondent filed exceptions to the Supplemental Decision and a brief in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions thereto, the brief and answering brief, the Supplemental Decision, the exceptions thereto and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith:

The facts are fully set forth in the Trial Examiner's Decisions. On December 28, 1966, employee Martin contacted Union Representative Norman about organizing Respondent's employees. The next day Norman held a meeting during which 12 employees, including 2 alleged supervisors, Shafer and Marsh, signed authorization cards. (The parties stipulated that the unit consisted of 12 employees, excluding 3 whose eligibility was disputed.) On January 3, 1967, the Union sent a letter to the Respondent requesting recognition and on January 5 filed a representation petition (Case 9—RC—7096). On January 6, the Respondent replied that it did not believe the Union represented a majority and suggested that the Union petition the Board

for an election. On January 9, pursuant to the RC petition, the Respondent submitted a list of employees which included Shafer and Marsh as well as one other employee stipulated by all parties at the hearing to be a supervisor, and a dispatcher on whose status all parties reserved.

On February 3, at a prehearing conference on the Union's petition attended by the parties, Marsh and Shafer were present as employee representatives of the Union. During that conference, Union Attorney Smedstad asked Company Consultant Rector if the Respondent would enter into a consent election agreement. Rector replied that since the Union had been organized by supervisors (Marsh and Shafer) it would be unlawful for the Company to recognize it according to cases in the Sixth Circuit. At that point the Hearing Officer stated that evidence of organization by supervisors did not warrant a hearing since the Union's showing of interest could not be litigated in a representation proceeding. Rector then said, "Well, if you are going to deny me the right of a record on this, then the Board can do what it wants to. If it holds an election, the Company will not bargain with the Union." (At that time the issues going to the validity of an election were limited to the validity of the Union's showing, there being no dispute on jurisdiction, labor organization, or the appropriate unit.)

Immediately after Rector's statement, the union representatives withdrew the representation petition. After the withdrawal was approved Rector told Smedstad that if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest, the Company would go to a consent election. When Smedstad replied that the Union had "all the people lined up," Rector retorted that, since supervisors had

solicited these people, there was no fresh showing. Moreover, the Respondent would not bargain with the Union and there was no chance for a consent election at this point.

Subsequently, at a meeting on February 4, nine employees signed a statement that they voluntarily desired union representation and believed the Company would not want them to join the Union. While Shafer and Marsh attended the meeting, they did not sign the statement. Shafer resigned from Respondent's employ on February 6.

On February 6, Norman presented the statement to the plant manager who said that he would refer the matter to Rector. On February 8, Rector wrote Norman that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees, therefore, Respondent's recognition would violate Section 8(a)(2). The letter also stated that the Union had the opportunity to prove its claim before the National Labor Relations Board, but withdrew its petition. The letter concluded that although the Board should decide this matter, it is "powerless" to do so because of the withdrawal of the RC petition.

On February 15, the employees went out on strike in support of the Union's demand for recognition. Initially, Marsh did not join the strike on union instructions not to do so because his status as a supervisor was in question. On February 27, Marsh ceased work, apparently joining the strikers. The Union filed its charge of refusal to bargain on February 23, and the strike ended on June 1.

At the end of the strike Respondent refused to reinstate Marsh and another striker, Alexander. Marsh was refused reinstatement on the ground that he had quit. Alexander was refused on the strength of Re-

spondent's belief that he had provoked and participated in a violent incident related to the picketing at Respondent's plant.

On these facts, the Trial Examiner concluded that Respondent violated Section 8(a)(5) by refusing to recognize the Union, that the strike which occurred was an unfair labor practice strike, and that Marsh and Alexander were unlawfully denied reinstatement in violation of Section 8(a)(3). The Trial Examiner's recommended remedy included a direction to Respondent to recognize and bargain with the Union. We disagree with the Trial Examiner's conclusion that Respondent violated Section 8(a)(5), and we reject the conclusion that the strike was an unfair labor practice strike. We conclude nevertheless that Marsh and Alexander, as economic strikers, were wrongfully denied reinstatement in violation of Section 8(a)(3).

Our conclusion that Respondent violated Section 8(a)(3) requires, as a threshold matter, that we examine the nature of the violations and their probable impact on Respondent's employees in order to determine whether an order to bargain is an appropriate remedy for those violations under the standards of *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). *Gissel* establishes our discretion to impose a remedial order to bargain in any case where we find that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. . . ." *Id.*, 614–615. We conclude that Respondent's violations here did not have such an impact on the employees that a fair and truly representative election could not have been conducted. We reach

this conclusion upon assessment of the extensiveness of the practices, their effect on election conditions (although the Union withdrew its petition and no election was conducted) and the likelihood of their recurrence. We rely on the facts, among others, that the violations were quite distant in time from the start of the union organizing campaign and occurred under circumstances which could not readily be regarded by other employees as retribution for any organizing activity. Nor are we persuaded that there is substantial likelihood that such practices will recur. The Respondent here declined to reinstate the two employees for reasons which do not suggest far-reaching antiunion animus: Marsh was thought by Respondent, albeit mistakenly, to be a supervisor; Alexander was thought to have engaged in picket line misconduct.

Although we now conclude that Respondent's defense as to each is insufficient, and that each violation occurred, we cannot assume, on these facts, that Respondent was motivated, in either case, by other than a good-faith belief in the propriety of its actions. Such impact as there may have been will, in any event, be substantially erased by our traditional remedy of reinstatement, backpay, and posting of notices.

We next consider whether, aside from the rationale of *Gissel*, an order to bargain may be imposed on the ground that Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union following the Union's proffer of authorization cards from a majority of Respondent's employees.

We recently held in *Derse, Arthur F., Sr., President, and Wilder Mfg. Co., Inc.*,[1] that mere refusal to recognize on the strength of a card showing was

[1] 185 NLRB No. 76.

not enough to support a finding of an 8(a)(5) violation. We did, however, find a violation under the facts of that case where the employer had independent knowledge of the union's majority status and where no effort was made to resolve any possible majority status issue through resort to Board election procedures.

In the instant case we must evaluate a refusal to recognize the Union on the strength solely of its authorization cards, an abortive Board election proceeding, and then a strike. The election proceeding was terminated by action of the Union in withdrawing its petition although that withdrawal appears to have been motivated by the precipitate declaration of Respondent's representative that "if [the Board] holds an election, the Company will not bargain with the Union." This statement in turn was motivated by the Hearing Officer's ruling that evidence of possible supervisory taint of the showing of interest would not be received at the hearing, since the investigation of showing of interest is an administrative matter which cannot be litigated in the course of a representation proceeding. Subsequently, the Employer's representative offered to consent to an election if the Union submitted a new petition supported by a "fresh" 30-percent showing of interest.

The facts of this case demonstrate the difficulties of attempting to interpret and apply Section 8(a)(5) of the Act to situations in which the Union's majority status has not been established through our election processes, and where the record does not contain evidence of independent unfair labor practices which would justify a bargaining order under *Gissel*.

At the outset, we note that in *Gissel* the Supreme Court did not face this issue and explicitly refrained

from providing any guidance in this area. Rather, after setting forth its understanding of the positions of the parties as to a proper interpretation of the law applicable to the cases then at bar, the Court declared that it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Id.*, 595. Later in its opinion the Court reiterated and elaborated upon this point:

In dealing with the reliability of cards, we should reemphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time retions" of that election. We thus need not decide that would tend to disturb the "laboratory condifraining from committing unfair labor practices whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside. [*Id.*, 601, fn. 18.]

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The resolution of the instant proceeding now requires the Board to face and decide one of the difficult issues which the Supreme Court left open in *Gissel*: whether, absent election interference, an employer who insists on an election must initiate the election by his own petition. Board precedent on the issue is something less than a model of clarity. The "current practice" of the Board was summarized in *Gissel* as follows:

Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength. [*Id.*, 594.]

There is some question as to whether the summary is entirely accurate. The statement that an employer could not refuse to bargain "if he *knew*, through a personal poll for instance, that a majority of his employees supported the union," may well have referred to *Snow, Fred, Harold Snow and Tom Snow, d/b/a Snow & Sons*, 134 NLRB 709, enfd. 308 F.2d 687 (C.A. 9). But the decision in that case rested not only on the fact of employer *knowledge*, but also upon the fact that the employer breached his agreement to permit majority status to be determined by means

other than a Board election. That case must be distinguished from our recent decision in *Wilder, supra.* There we found an 8(a)(5) violation not only because of admitted employer knowledge of majority status, but also because of the absence of any evidence that the employer was willing to resolve any lingering doubts of majority status through our election procedures.

The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons,* the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder,* or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline, in summary, to reenter the "good-faith" thicket of *Joy Silk,*[2] which we announced to the Supreme Court in *Gissel* we had "virtually abandoned . . . altogether," *id.,* 594.

These considerations lead us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election. We repeat for emphasis our reliance here upon the additional fact that the Respondent and the Union never voluntarily agreed upon any mutually acceptable and legally permissible means,

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[2] *Joy Silk Mills, Inc.,* 85 NLRB 1263, enfd. as modified 185 F.2d 732.

other than a Board-conducted election, for resolving the issue of union majority status. By such reliance we recognize and encourage the principle of voluntarism but at the same time insure that when voluntarism fails the "preferred route" of secret ballot elections is available to those who do not find any alternative route acceptable.

We shall, therefore, dismiss the 8(a)(5) allegations of the instant complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their

former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examinaton and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Order.

(d) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps

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[3] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C.

[SEAL] NATIONAL LABOR RELATIONS BOARD
EDWARD B. MILLER, *Chairman.*
HOWARD JENKINS, JR., *Member.*
RALPH E. KENNEDY, *Member.*

Members FANNING and BROWN, dissenting:

For the reasons explained below, we would affirm the Trial Examiner's finding that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a)(5) of the Act and that, in the circumstances presented, a bargaining order is clearly warranted.

Under settled Board and court policy, an employer, when confronted by a recognition demand based on authorization cards allegedly signed by a majority of his employees, does not automatically violate Section 8(a)(5) of the Act if he declines such demand and insists, instead, upon an election requesting the union to file a represenation petition or filing it himself under Section 9(c)(1)(B) of the Act.[4] Such violations are most frequently found where the employer's denial of recognition is accompanied by independent unfair labor practices impeding the Board's election

[4] See discussion of *N.L.R.B.* v. *Gissel Packing Company, Inc.*, 395 U.S. 575, *infra.*

processes. This is not to say, however, that such unlawful conduct is an indispensable prerequisite to an 8(a)(5) finding, or that, absent such independent unfair labor practices, employers are necessarily free to decline recognition until the Union shall have been certified. Thus, an employer may not avoid or delay his statutory obligation to bargain where there is no real dispute that a union represents a majority of his employees and the refusal to bargain is founded upon considerations extraneous to the union's majority status.[5] In the absence of such a dispute, an employer violates Section 8(a)(5) of the Act if his refusal to bargain is based, for example, on an erroneous view of the law,[6] or an erroneous belief that the unit requested by the union is inappropriate,[7] or that the union representatives were under a legal disability which prevented them from binding the union,[8] or that his employees were independent contractors.[9]

Similarly, an employer, having satisfied himself (by card check, independent poll of the employees, or by other means) that a union enjoys the support of a majority of his employees, may not thereafter assert a doubt of the union's majority as grounds for refusing to bargain and insisting on an election.[10] In *Snow*

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[5] *H & W Construction Company, Inc.*, 161 NLRB 852, 854–855, and cases cited therein.

[6] *Old King Cole, Inc.* v. *N.L.R.B.*, 260 F.2d 530, 532 (C.A. 6).

[7] *United Aircraft Corporation* v. *N.L.R.B.*, 333 F.2d 819, 833 (C.A. 2), cert. denied 380 U.S. 910; *Florence Printing Co.* v. *N.L.R.B.*, 333 F.2d 289 (C.A. 4).

[8] *N.L.R.B.* v. *Burnett Construction Co.*, 350 F.2d 57 (C.A. 10).

[9] *N.L.R.B.* v. *Keystone Floors, Inc., d/b/a Keystone Universal Carpet Co.*, 306 F.2d 560, 564 (C.A. 3).

[10] *Snow & Sons*, 134 NLRB 709, enfd. 308 F.2d 687 (C.A. 9), cited with approval in *Gissel Packing Co., Inc.*, 395 U.S. 575; *Wilder Mfg. Co.*, 185 NLRB No. 76.

& Sons, supra, for example, we held, with court approval, that the employer violated Section 8(a)(5) where, having agreed to be bound by an independent check of a union's authorization cards to resolve his doubt as to the union's majority status—which check substantiated the union's claim of majority—the employer reneged on his agreement by continuing to refuse to bargain and insisting upon an election.

Briefly, the facts in this case show that, in response to the Union's initial recognition demand, the Respondent, on January 6, 1967, replied that it did not believe that the Union represented a majority and suggested that the Union petition the Board for an election. The Union had already filed such a petition on January 5. On February 3, when the parties met for a prehearing conference pursuant to the Union's petition, the Respondent announced that it would not bargain with the Union in any event—even if it were certified by the Board after winning an election—because it contended that the Union represented supervisors (Marsh and Shafer) who influenced the employees in signing authorization cards.[11] The Union thereupon withdrew its petition and, after withdrawal was approved, the Respondent's representative, Rector, told the Union's attorney, Smedstad, that if the Union submitted a "fresh" 30-percent showing of interest the Company would agreed to a consent election.

At a meeting with the Union on the following day, February 4, nine employees signed a statement that they voluntarily desired to be represented by the Union and that they believed the Company would not

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[11] Alleged supervisors Marsh and Shafer attended this conference as employee representatives of the Union. This status is discussed, *infra.*

want them to join the Union. Although alleged supervisors Marsh and Shafer attended that meeting, they did not sign the statement. Shafer resigned from Respondent's employ on February 6. On that day the Union's representative presented the employees' statement of reaffirmation to the Company and, on February 8, Rector wrote to the Union that the Respondent refused to recognize the Union because its membership included supervisors who influenced employees and that, therefore, recognition would violate Section 8(a)(2) of the Act. On February 15, a majority of the employees in the unit went out on strike in support of the Union's recognition demand. On advice of the Union, alleged supervisor Marsh did not participate in the strike, as his status was in dispute.

Based on the foregoing facts, which our colleagues do not dispute, it is clear that, at the time of the Respondent's refusal to bargain on February 8, there was no question and the Respondent had no doubt that a majority of its employees supported the Union and wanted the Union to represent them for purposes of collective bargaining, and that its refusal was grounded solely upon an erroneous belief that supervisors had influenced the unit employees and that, therefore, the Union's majority was tainted. In these circumstances, we would find, for the reasons substantially as stated in *H & W Construction Company, Inc.*,[12] that the contentions asserted by the Respondent for refusing to bargain, being unrelated to the Union's majority status, did not constitute an adequate defense to the refusal-to-bargain complaint and that the refusal to bargain, therefore, violated Section 8(a)(5) of the Act. For, neither the statement signed by the nine employees nor the strike in which a majority of

[12] 161 NLRB 852, 854–855.

the employees openly reaffirmed their support of the Union indicated any participation or influence by alleged supervisors. Furthermore, the record establishes, and the Trial Examiner found, that Marsh was not a supervisor and, in light of the facts, the Respondent's contention to the contrary borders on frivolity. As to Shafer, whom the Trial Examiner found to be a supervisor, there is no evidence that he influenced the employees to support the Union. In fact, and because their status was in issue, neither Marsh nor Shafer signed the statement in which a majority of the employees reiterated their voluntary allegiance to the Union. In addition, Shafer resigned from the Respondent's employ on February 6, 2 days before the Respondent refused to bargain with the Union on grounds of alleged supervisory influence. Therefore, even assuming, *arguendo,* that Shafer's presence at the February 4 union meeting may have indirectly influenced employees (a finding which we do not make) such influence would have been completely dissipated and neutralized by his resignation, and therefore, he could certainly not have improperly influenced the employees in their concerted decision to go out on strike on February 15.

Our colleagues, on the other hand, find that a bargaining order is not warranted under the principles enunciated in *Gissel,*[13] since the Respondent's unfair labor practices here were not such as would preclude the holding of a fair election, and that, therefore, this case raises the very issues which the Supreme Court expressly left unanswered in *Gissel:*[14] whether, absent

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[13] *N.L.R.B.* v. *Gissel Packing Company, Inc.*, 395 U.S. 575.

[14] Because the employer's refusal to bargain in *Gissel* was accompanied by independent unfair labor practices tending to preclude the holding of a fair election, the Supreme Court

election interference, an employer who insists upon an election must initiate the election by his own petition. We fail to perceive how the facts of this case put that question squarely in issue here. For, the record clearly establishes that the employer did not insist upon an election, or even want an election. Nor was the employer's refusal to bargain at any time based upon an asserted doubt of majority or any other issue resolvable through an election. To the contrary, the Respondent had knowledge, independently of the authorization cards, that a majority of its employees supported the Union and not only refused to bargain because of considerations extraneous to the Union's majority, but expressly and completely rejected the idea of going to an election by aggressively announcing that it would not bargain even if the Union were certified pursuant to a Board election. This assertion directly caused the Union to withdraw its petition as a wholly futile route for resolving any question of majority status and, in our view, tainted the possibility of holding a fair and meaningful election. As the operative facts herein are undisputed, the majority opinion raises and resolves issues not germane to this case.

What disturbs us more, however, is that the majority's resolution of the foregoing issue ignores the guidelines provided in *Gissel, supra,* and overrules, without specifically so stating, our recent decision in *Wilder*[15] which followed those guidelines in resolving that same issue. To the extent relevant here, the

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said: ". . .we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." *Supra*, 595; see also p. 601, fn. 18, set forth in text of majority opinion.

[15] *Wilder Mfg. Co., Inc.*, 185 NLRB No. 76.

Supreme Court's *Gissel* opinion, aside from its specific holdings, is noteworthy in that: (1) it expressly reaffirms the historical interpretation of the Act with respect to an employer's bargaining obligation under Section 8(a)(5) whenever the union presents "convincing evidence of majority support" and the propriety of establishing such obligation by means other than a Board-conducted election;[16] and (2) it rejects

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[16] In discussing whether a union can establish a bargaining obligation by means other than a Board election, the Supreme Court said:

"A union is not limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8(a)(5) . . . that '[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).' Since § 9(a) . . . refers to the representative as the one 'designated or selected' by a majority of the employees without specifying precisely how that representative is to be chosen, *it was early recognized that an employer has a duty to bargain whenever the union representative presented 'convincing evidence of majority support.'* Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. [Footnotes omitted.] [Emphasis supplied.]

"We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. . . . Thus . . . we . . . pointed out in [*United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62 (1956)], where the union had obtained signed authorization cards from a majority of the employees, that '[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recog-

the contention that Section 9(c)(1)(B) of the Act gives employers an absolute right to an election at any time and finds, instead, that subparagraph (B) of Section 9(c)(1) was enacted to allow an employer, after being asked to bargain by a union claiming to represent a majority of his employees, to test out his doubts as to the union's majority.[17]

The Board adhered to these principles in *Wilder, supra.* Although the employer's refusal to bargain in that case was not accompanied by independent unfair labor practices, the Board nevertheless held that a bargaining order was appropriate, because the record contained substantial evidence, in addition to the signed authorization cards, to demonstrate the employer's knowledge of majority status, and no evidence demonstrating the employer's willingness or desire to resolve any doubts which it may have entertained through the election process.[18] That decision, in our opinion, is sound law and reflects long-estab-

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nition of the union would have violated §8(a)(5) of the Act.' 351 U.S., at 69. We see no reason to reject this approach to bargaining obligations now. . . . [*Gissel, supra*, 596–598.]"

[17] The Court, at page 600, expressly "agree[d] that the policies reflected in Section 9(c)(1)(B) fully support the Board's present administration of the Act (see *supra*, at 591–592)." This latter reference is to the Court's summation of the Board's current practice, to wit:

"When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, *unless he has knowledge independently of the cards that the union has a majority*, decline the union's request and insist on an election, either by requesting the union to file an election petition, or by filing such a petition himself under § 9(c)(1)(B). [Emphasis supplied.] *Gissel, supra*, 591."

[18] The Board based its finding of employer knowledge upon the fact that all 11 of the 18 unit employees who had signed authorization cards "dramatically evidenced their support for the Union by actively participating in a picket line and a

lished principles which the Supreme Court reaffirmed in *Gissel, supra.* The majority, on the other hand, would now quietly overrule *Wilder* and find that, except for an election, a bargaining obligation under Section 8(a)(5) may be established only in situations such as prevailed in *Snow & Sons,*[19] where the employer having agreed to abide by the results of a private poll of his employees, subsequently reneged on that agreement when the poll confirmed the union's claim of majority.[20] We cannot accept this limited approach to determining an employer's bargaining obligation as we believe it is contrary to well-established law. It is significant that the Supreme Court, in *Gissel, supra,* expressly cited union-called strikes or strike votes as examples of "convincing evidence of majority support" upon which a union may rely to invoke a bargaining obligation under Section 8(a)(5).

In view of all the foregoing, we would find that the Respondent's refusal to bargain with the Union on and after February 8, 1967, violated Section 8(a)(5) of the Act and that, in all of the circumstances, a bargaining order is clearly warranted.

Dated, Washington, D.C.

NATIONAL LABOR RELATIONS BOARD,
JOHN H. FANNING,

Member.

GERALD A. BROWN,

Member.

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strike" and the employer's concession that it knew that 10 or 11 employees in the unit supported the union. *Wilder, supra.*

[19] *Snow & Sons,* 134 NLRB 709, enfd. 308 F.2d 687 (C.A. 9).

[20] Indeed, in our view, this case is not unlike *Snow & Sons, supra,* since the Respondent had agreed to go to a consent election if the Union submitted a "fresh" 30-percent showing of interest, and thereafter reneged on its promise when the Union submitted such showing which indicated that a clear majority supported the Union.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.

(Employer)

Dated_____ By_____

(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513–684–3686.

TXD–754–67
Columbus, Ohio

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Cases Nos. 9–CA–4197; 9–CA–4283; 9–CA–4309

LINDEN LUMBER DIVISION, SUMMER & CO.

AND

TRUCK DRIVERS UNION LOCAL NO. 413, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Edward C. Verst, Esq., for the General Counsel.
Victor I. Smedstad, Esq., of Dayton, Ohio, for the Union.
Mr. Harvey B. Rector, Labor Consultant, of North Lawrence, Ohio, for the Respondent.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

IVAR H. PETERSON, Trial Examiner: Upon separate charges filed by Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued complaints which on July 31, 1967[1] were consolidated for hearing, against Linden Lumber Division, Summer & Co., herein called the Respondent. Briefly stated, the complaints alleged that the Respondent had unlawfully refused to bargain with the Union, thereby causing an unfair labor practice strike, and that it had discriminatorily refused to reinstate two employees, all in violation of Section 8(a)(5), (3) and (1) of the Act. The Respondent answered, admitting certain allegations but denying the commission of any unfair labor practices; by way of affirmative defense, it alleged in substance that the Union was formed by supervisors of the Respondent and was not, therefore, entitled to recognition; as to the alleged discrimination against two employees, it averred that one, Richard Marsh, was a supervisor who "established and dominated" the Union; and as to Richard L. Alexander, that he "participated in an act of violence against two customers of Respondent during the strike" and in consequence was not entitled to reinstatement.

[1] Unless otherwise indicated, all dates refer to the year 1967. The charges in Case No. 9–CA–4197 were filed February 23 and the complaint issued May 24; in Case No. 9–CA–4283 charges were filed on May 25 and the complaint issued on July 31; and in Case No. 9–CA–4309 the charges were filed on June 8 and the complaint issued on July 31.

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Pursuant to notice, I heard the case in Columbus, Ohio, on October 3 and 4. All parties were represented and were afforded full opportunity to participate in the hearing. Briefs filed by each of the parties have been considered.

Upon the entire record in the case, I make the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

The Respondent is an Ohio corporation engaged in the manufacture of prefabricated homes and the sale of lumber products at its plant in Columbus, Ohio. It annually has a direct inflow of products valued in excess of $50,000 which it obtains from points outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. BACKGROUND

On December 28, 1966, William Martin, an employee of the Respondent called Dow Norman, business agent and organizer of the Union, advising that the Respondent's employees desired to join the Union and have it act as their collective-bargaining representative. As a result of this call, 12 employees, including Marsh and Alexander, the alleged discriminatees,

attended a meeting with Norman on December 29, 1966, at a restaurant in Columbus. All signed authorization cards on behalf of the Union.

On January 3, Mit Duncan, Secretary-Treasurer of the Union, wrote to the Respondent, attention William Riley, general manager, stating that the Union had been designated as the collective-bargaining representative by a majority of the Respondent's "truck drivers, warehousemen, production workers, maintenance men and yard men." He demanded that the Respondent recognize the Union as "the agent for collective bargaining for these employees." The Respondent replied on January 6, stating that it did not "believe that your Union does represent a majority," declining to grant recognition, and suggesting that the Union petition the Board for an election as that procedure "is the proper way to determine such question."

In the meantime, on January 5, the Union did file a petition for a representation election (Case No. 9–RC–7096), describing the appropriate unit as consisting of "All truck drivers, warehousemen, production workers, maintenance men and yard men," excluding "office, clerical, supervisory and professional employees, guard, watchmen and all others excluded by the Act." In response to the Regional Director's request for a list of employees "falling within the alleged appropriate unit," the Respondent replied on January 9, attaching a "list of employees who perform duties in the general classifications listed in the petition."[2]

A representation hearing on the Union's petition was scheduled for February 3. When the parties met

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[2] Included in the list of names, 15 in number, were Marsh and Alexander, as well as Henry Shafer and Roy Toops. At the hearing the parties stipulated that Toops was a supervisor; the Respondent asserted that both Marsh and Shafer were also supervisors.

for the hearing, the Union was represented by Victor Smedstad, attorney; Business Agent Norman; and employees Marsh and Shafer. The Respondent was represented by Harvey Rector, labor consultant; General Manager Riley; Dispatcher Robert Dupree; Yard Foreman Roy Toops; and employees William Lynch and William Mason. At the outset of the representation proceeding, and before the Hearing Officer formally opened the hearing, Mr. Rector and Attorney Smedstad, together with the hearing officer, engaged in a discussion, following which the Union signed a request to withdraw its petition.

In this proceeding, Attorney Smedstad testified in some detail regarding this discussion, and, although other witnesses (Norman, Marsh, and Riley) also testified concerning this episode, their accounts do not materially vary from that of Smedstad. I accept Smedstad's testimony, principally on the ground that it is not contradicted and because he impressed me as the more likely, in view of his legal training and experience, to understand the somewhat technical aspects of the discussion. The findings which next follow are based upon his version.

Mr. Smedstad inquired of Mr. Rector if there was any possibility of entering into a consent election agreement. Rector replied there was not. The Hearing Officer then asked Rector whether he would stipulate that the Union was a labor organization within the meaning of the Act, and Rector replied he could not so stipulate, because, he said, the Union had been organized by supervisors of the Company and it would, therefore, be unlawful for the Company "to recognize any union that had been organized by supervisors." After some further discussion Rector agreed

that the Union, as such, was a labor organization within the meaning of the Act, but stated that he wanted "to go on the record and make a record on the way in which this union was organized" and to show that "supervisors . . . coerced some of the employees into signing cards." Mr. Jack Baker, the Hearing Officer, then stated that the Union's showing of interest was not a matter to be litigated in the representation proceding. The following exchange then occurred, as related by Smedstad:

> . . . Mr. Rector said, "You mean you are denying me the right to make a record, to have a record?" And Mr. Baker said, "Well, on this issue of how the union got its showing of interest, I will not hear this evidence."
> Mr. Rector said, "Well, if you are going to deny me the right of the record on this, then the Board can do what it wants to. If it holds an election, the company will not bargain with the union."

Mr. Smedstad thereupon obtained a recess and discussed the situation with officials of the Union. Returning to the hearing room, he asked the Hearing Officer for a withdrawal form. This was signed by Smedstad, without objection from Mr. Rector. Later, before leaving the hearing room, Smedstad and Rector had a conversation, the substance of which was that under no circumstances would Rector enter into a consent election agreement, even if the Union obtained a new showing of interest, saying that "it was through the action of supervisors that they [the employees] signed up, and, therefore, we will not sit down and bargain with you."[3]

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[3]Rector did not testify.

B. THE REFUSAL TO BARGAIN AND THE STRIKE

1. The Union's majority

Immediately following the conclusion of the February 3 meeting, Smedstad and Norman went to the Union's hall, where Smedstad drafted three documents: a recognition agreement which contained a clause whereby the Union agreed to refer to the Board the unit status of such persons as the parties could not agree were or were not supervisors; a document for employees to sign, stating, in part, that they wished the Union to represent them and that each "has voluntarily attended the meeting at which this is being signed" and each "has voluntarily signed" and "believes the company would not want us to join Truck Drivers Union, Local No. 413", and concluding with a request that the Respondent recognize and bargain with the Union while the employee and unit status of Marsh and Schafer was being determined by the Board (G.C. Exhibits 8, 9, and 10).

Norman called a meeting of the employees on February 4, at the union hall. Eleven employees attended, including Marsh and Shafer. Norman informed the employees of what had transpired at the scheduled hearing the day before and distributed copies of the three documents prepared by Smedstad to nine of those present, but not to Marsh or Shafer, stating that because their employee status was in question they could not participate in the meeting in any manner. All nine remaining employees, excluding Marsh and Shafer, signed the statement expressing their voluntary desire to be represented by the Union.

On February 6, Business Agent Norman took the documents referred to above to the Respondent's plant, and presented them to General Manager Riley. Norman credibly testified that, after showing the

papers to Riley, the latter said he would refer the matter to Rector. Under date of February 8 Rector wrote to Norman, stating that the Respondent "refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit." He added that for the Respondent to extend recognition "would be in violation of Section 8(a)(2) of the Act, because any signatures you may have obtained under this [supervisory] influence would not be legal." He further stated that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages."

At the December 29 meeting 12 employees (assuming for present purposes that Marsh and Shafer are not supervisors) signed union authorization cards which were properly authenticated at the hearing by Norman.[4] At the February 4 meeting nine employees signed the document prepared by Smedstad acknowledging that they voluntarily desired the Union to represent them.[5]

The complaint (Case No. 9–CA–4197) alleged, and the Respondent's answer admitted, that the following unit is appropriate within the meaning of Section 9(b) of the Act:

> All truck drivers, warehousemen, production and maintenance employees and yard men at Respondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards and supervisors as defined in

[4] These were: Richard Alexander, Frederick Baum, Homer R. Beckelheimer, Melvin Brice, Roy L. Hamilton, Gilbert Kountz, Norman LeVeck, Richard Marsh, Bill A. Martin, Floyd Ross, Henry Shafer, and John W. Thompson.

[5] The employees signing were: Alexander, Beckelheimer, Brice, Hamilton, Kountz, LeVeck, Martin, Ross, and Thompson.

> the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulated that at all times material there were 10 employees in this unit.[4]

I find that at all times material the Union represented a majority in the appropriate unit.

2. The employee status of Marsh and Shafer

a. Marsh

Marsh was first employed by the Respondent as a truckdriver for approximately 3 years; in February 1965, he began working as a truss maker in the truss department. While employed in that capacity, he also drove a truck, operated a forklift, worked in the yard, and unloaded boxcars. He generally reported to work at 7:30 a.m. and punched the timeclock. According to Marsh's credited testimony, he spent an average of 90 percent of his time in the actual construction of trusses, while the balance of his working time was devoted to setting up jogs and other duties as set out above. He, as well as LeVeck, answered the telephone and quoted prices to customers from detailed price lists made available to them.

I credit Marsh's testimony that he was never advised by anyone in management that he had any

[4] They further agreed that Toops was a supervisor. General Counsel contended that Marsh was nonsupervisory and therefore a member of the unit, whereas the Respondent contended that he was supervisory. With respect to Shafer, the Union took no position as to his unit status, the General Counsel reserved his position, while the Respondent contended Shafer was "mill superintendent." Counsel for the Respondent further stated Beckelheimer "became foreman in Shafer's place when Shafer resigned on February 6."

supervisory authority as defined in Section 2(11) of the Act.[7]

The Respondent called several general contractors—William B. Lift, Walter Webb, and Joseph Betts—who testified to the effect that they (the general contractors) had been introduced to Marsh by members of Respondent's management, as the truss superintendent. Aside from the fact that some of their testimony, which need not here be detailed, did not impress me a worthy of credit, it is plain that the title conferred upon Marsh by his superiors when the latter introduced him to customers of the Respondent as the superintendent of the truss department, is entitled to litle if any weight in determining his status.

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[7] General Manager Riley testified, in conclusionary terms, to the effect that Marsh was a supervisor. However, he admitted that Marsh had never been carried on any company records, such as the payoll records, as having a supervisory title, and that no notice was ever posted informing any of the Respondent's admitted nonsupervisory employees of Marsh's alleged supervisory status. William Dunfee, assistant manager, testified that he informed Marsh in March 1965, that he was truss superintendent as the successor of one John Phillips who had formerly been the trust superintendent and whom Marsh replaced. When Phillips held this position, he was paid a salary of $135 or $150 per week. When Marsh allegedly became truss superintendent he was then receiving an hourly rate of $2 and did not receive an increase in pay at that time. Later in the year, Marsh received an increase. When he last worked for the Respondent, he was being paid $2.30 per hour, plus time and one-half for work in excess of 40 hours per week.

The objective facts, the conclusionary nature of Riley's testimony and the admissions made by him and the obviously evasive demeanor of both Riley and Dunfee, convince me that they are not entitled to be credited unless their testimony is corroborated by reliable and creditable oral testimony or written documents.

Upon all the above I find that Marsh did not possess or exercise supervisory authority at any times here relevant. Accordingly I find he is to be included in the unit.[8]

b. Shafer

As noted above, Shafer resigned on February 6, 1965. It is, therefore, unnecessary for the purpose of this proceeding to determine whether or not he occupied a supervisory position. In any case, the evidence is inconclusive.

3. The strike and its nature

As found above, the Union was the majority representative of the employees in the appropriate units

[8] See *N.L.R.B.* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C.A. 1), where the court observed: "Certainly it cannot be that an employer can make a 'supervisor' out of a rank-and-file employee simply by giving such an individual a title and theoretical power to perform some or all of the supervisory functions listed" in Section 2(11) of the Act. See also *Quincy Steel Casting Co., Inc.* v. *N.L.R.B.*, 200 F. 2d 293–297 (C.A. 1), where the same court stated that "the important thing is the actual duties and the authority of the employee, not his formal title." (Citing *Red Star Express Lines* v. *N.L.R.B.*, 196 F. 2d 78, 79–80 (C.A. 2). In reaching the above conclusions regarding Marsh's status, I have carefully considered the testimony of management representatives and the manager of Nugents-American Contractors, which organization on occasion supplies temporary labor to the Respondent, and Marsh's testimony about the manner in which he was involved in such procurement of temporary labor. I credit Marsh's testimony in this regard, and that of Mr. Dove, who in answer to a question on cross-examination by Counsel for the General Counsel, whether orders for temporary help "have also been signed by other employees of Linden Lumber other than Richard Marsh?" answered "Right."

at all times here material. Paragraph 8 of the complaint (Case No. 9–CA–4197), alleged that the Union requested and thereafter continued to request, following February 6, that the Respondent bargain collectively with it. Paragraph 9 alleged that on or about February 8, and at all times thereafter, the Respondent refused and has continued to refuse to recognize and bargain in good faith with the Union by (a) refusing to grant recognition to it as the exclusive bargaining representative of the unit employees, and (b) refusing to meet with the Union to discuss rates of pay, wages, and other terms and conditions of employment. Paragraph 10 alleged that on February 15, "certain employees of Respondent employed in the said unit . . . ceased work concertedly and went out on strike"; and paragraph 11 alleged that the strike described above "was caused and prolonged by the unfair labor practices of Respondent" previously described in paragraphs 5 and 9.

In its answer to this complaint the Respondent denied the pertinent paragraphs "for the good and following reasons": (a) with respect to the representation hearing, previously referred to, it was the Respondent's contention "that it could not legally recognize a union comprised of supervisors"; (b) it further stated that the claim of majority status was "based on the allegation that 4 employees, led by three supervisors, constitutes the majority of the employees of the respondent." The answer further alleged that no union "is the exclusive bargaining agent for the employees of respondent," and that the Union "requested recognition by sending the company a list of names which included a supervisor." Finally, the Respondent alleged that Region 9 of the Board "has made it clear

that the respondent must bargain regardless of the supervisory issue."[9]

As found above, Marsh is not a supervisor and, accordingly is entitled to be and is included in the appropriate unit. The status of Shafer need not be

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[9] The Respondent, in the concluding paragraph of its answer in Case No. 9-CA-4197, alleged that it "has never refused to bargain with a legally constituted and designated or certified unit of its employees. Respondent does refuse to recognize its supervisors as union representatives because such a union or unit thereof would be contrary to law." In support of this affirmative defense the Respondent cites *Wells, Inc.*, 68 NLRB 545 (1946), in which the Board dismissed an allegation of violation of Section 8(5) of the Wagner Act on the ground that "the Union's majority was procured with the direct and open assistance of a supervisory employee" and thus did not "represent the free and untrammeled will of the employees and hence cannot be recognized as [a] valid majority." The Court of Appeals for the Ninth Circuit enforced the Board's order, *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, but modified the portion thereof requiring the reinstatement of the foreman, found by the Board to have been discriminatorily discharged, who had been responsible for the recruitment of his subordinate employees into the union. In addition, the Respondent cites *Jack Smith Beverages, Inc.*, 94 NLRB 1401, where the Board ordered the disestablishment of an affiliated union which it found to have been supported and dominated by the employer, in violation of Section 8(a)(2) of the Act; and *N.L.R.B.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), where the Court, following remand from the Supreme Court of the United States (332 U.S. 840), modified its prior order enforcing an order of the Board, issued prior to the 1947 amendment of the Act, so as to set aside (in agreement with the Board's contention) those provisions of the previously enforced order of the Board directing the employer there involved to cease and desist from discouraging membership in the Foreman's Association of America, in any other manner interfering with its supervisory employees' efforts to bargain collectively through that organization, and to post appropriate notices with respect to these matters.

passed upon for the purpose of this proceeding, inasmuch as he terminated his employment on February 6, and, in any event, his inclusion or exclusion could not affect the result.

Under date of February 8, Mr. Rector, the Respondent's labor consultant, replied to Norman's request for recognition which had been delivered to Rector on February 6, as follows:

> The company refuses to recognize your union as bargaining agent because your membership includes supervisors . . . who influenced and dominated employees of the proposed unit. This position was made clear by the company at the NLRB hearing February 3, 1967 in Case NO. 9–RC–7096. Your union had the opportunity to prove its claims before NLRB but withdrew its petetion (*sic*). Therefore, the company can not recognize your union so long as the supervisory influence exists. To do so would be in violation of Section 8(a)(2) of the Act. . . .

Rector's answer to Norman's request continued that it was his understanding from the Company that the Union "threatened to strike." He added that "if there is a strike, at this time, both your union and the supervisors in question will be liable to suit for damages." Concluding, Rector stated that the Board "should decide this matter" but, in view of the fact that the Union had withdrawn its petition, the "NLRB is powerless to rule."

Attorney Smedstad, whose testimony I credit, gave the following answers to the questions on cross-examination by Mr. Rector:

> Q. I have one question. Is it your testimony then that you actually withdrew the petition because you did not want to go through a long, lengthy litigation before the Board?

A. Before the Board and before the Court of Appeals which would, from my experience, take a good two years or better.

Q. I daresay, you are right; but that is the reason you withdrew your petition?

A. That is correct.

Mr. RECTOR. Thank you. No further question.

TRIAL EXAMINER. You are excused, Mr. Smedstad.

Concerning the conference between Attorney Smedstad and the employees and Norman prior to the conclusion of the representation proceeding, Smedstad credibly testified that he advised the employees and Norman that " 'regardless of how it [the representation proceeding] turns out, it will be two years in all likelihood before you can sit down and bargain with this company. There is a possibility that through economic action, in the way of a strike, the company might be willing to sit down and bargain, without having to go through any election.' " His further testimony, which I credit, is that the employees and Norman, the union representative, told him that "it was their opinion that the employees were so highly irritated because of the manner in which the company was being run and the working conditions that all they would have to do would be to drop a nickel in the phone box and they would be out on the street right then and there." Smedstad thereupon told the union representatives and employees that it was necessary for them to stick together, and that if they felt the way they expressed themselves, he would ask the union president for authority to withdraw the petition. He then telephoned the union office and talked to Dale Mann, president of the Union, recited to him what the problem appeared to be, and received full authority to withdraw the petition if he deemed that action advisable.

At the subsequent private conference between Smedstad and Rector, the latter, according to Smedstad's credited testimony, referred to the fact that he had known Robert C. Knee, the attorney with whom Mr. Smedstad was associated, for a good many years. Rector further added, again according to Smedstad's credited testimony, that it had been the policy of his organization "that whenever the union has a 30 percent showing of interest that we are more than happy to enter into a consent agreement." Smedstad replied that he could assure Respondent that the Union had "well over 30 percent" in this situation, to which Rector retorted that it was his understanding from his investigation "that some supervisors have coerced some employees into signing cards." Smedstad rejoined that it was his understanding, as indicated by the exhibits to which reference has heretofore been made, that when the petition in the representation case was first filed, the Respondent submitted a list of 14 names to the Regional Office and advised that if the Union would agree to this list the Company would be willing to go through a consent election. To this, Mr. Rector rejoined: "Yes, that's when they didn't know what they were doing, and when I came in on the case, when I looked at that list, I found that the list was not correct. For example, there was one individual who was no longer working at the plant . . ." and "I understand that one or two people on here are supervisors."

Respondent's brief to the Trial Examiner consist of some four pages of argument, in which the following issues are raised:

> 1. Did the Hearing Officer deliberately refuse to go on the record so that Counsel for the Union would have grounds to file the unfair labor practice charge?

2. Why did the Union withdraw its petition?
3. Why did the Regional Director permit the withdrawal?
4. Why did the Hearing Officer refuse to go on the record?

The brief asserts that all of the testimony contained in the record creates a controversy "which was established by one fact only—the Hearing Officer denied the respondent benefit of record. In so denying the respondent his rights under the law, he set up a 'make weight' reason for the General Counsel, based upon a charge by the union, to issue a complaint seeking to force the respondent to bargain with said union without an election or due process of law. If the General Counsel is right and the statement of Rector is an unfair labor practice then the combined actions and conduct of the Hearing Officer, Counsel for the Union and the General Counsel constitute a conspiracy to defraud the respondent." [10]

I conclude that the evidence in this proceeding clearly establishes that the strike was caused by the unfair labor practices of the Respondent in refusing to recognize the Union and by its other unfair labor practices as above described. I find no merit whatever in the contention that the unit of employees (or the Union for that matter) was dominated by supervisors of the Respondent. By refusing to recognize and bargain with the Union as the exclusive representative of its employees, I find that the Respondent violated Sections 8(a)(5) and (1) of the Act, and that the strike which began February 15, was caused by the Respondent's unfair labor practices.

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[10] While it seems unnecessary to make any comment upon these arguments, it may not be inappropriate to note that they are specious and, for the most part, the citations in support thereof are distinguishable or wholly inapposite.

The parties agreed that the strike terminated on June 1, and all employees who desired to return to work were reemployed, with the exception of Marsh and Alexander. We turn then to the alleged individual discrimination against Marsh and Alexander.

C. THE DISCRIMINATION AGAINST MARSH AND ALEXANDER

1. Marsh

When the strike commenced on February 15, Marsh did not join in it for the reason that Norman had informed him that his status as an employee was still in question and, consequently, advised Marsh to continue working. Marsh did work until February 27 and then told General Manager Riley that the other employees who were working would not talk to him, and were giving him "dirty looks" and that one employee, Donald Alexander, was riding around with a German Shepherd dog in his truck. In consequence, Marsh told Riley that he did not think it was safe for him to continue working and that he had concluded he should go home. In response to Marsh's statement, Riley in substance stated that Marsh was "quitting"; Marsh, however, replied that he was "just going home until this union situation is straightened around to where I felt I was safe in the truss plant." Approximately a month later (about the latter part of March) Marsh returned to the plant and told Riley that, since matters seemed to have quieted down, he was ready to return to work. At this point I find, in accordance with the credited testimony of Marsh, that Riley told him he (Marsh) had quit.[11]

I find that Marsh did not quit on February 27, but, with Riley's consent, absented himself from work

[11] A careful check of Riley's testimony reveals no denial by him of the foregoing testimony of Marsh.

because of the conditions then prevailing. Moreover, I conclude that Marsh was, as an employee, a supporter of the strike from its inception, but, on advice of his union representative remained at work between February 15 and February 27. I further conclude and find that when Marsh, during the latter part of March, informed Riley that he was prepared to resume working inasmuch as the strike activities had apparently quieted down, Riley informed him that he had quit, and, in effect, discharged him because he was sympathetic with the Union's cause.

Accordingly I find that the Respondent violated Section 8(a) (3) and (1) of the Act by refusing to permit Marsh to return to work when he offered to do so in the latter part of March. Moreover, I am persuaded and find that Marsh became an unfair labor practice striker when he ceased working on February 27.

2. Alexander

It is not disputed that Alexander, who was employed by the Respondent in August 1965, was at all times here material an employee of the Respondent and that he went on strike February 15 and continued to participate in it. About the end of May he applied, in company with other strikers, for reinstatement. General Manager Riley, under date of June 2, wrote the following letter to Alexander:

> We regret to inform you that we are unable to reinstate you in your job because of your participation in violence during the course of the strike.

Without undue lengthening of this Decision, I find, upon the basis of the testimony from the proceeding before me and the related testimony in the official record in the criminal proceeding brought against

Alexander (which resulted in his acquittal) that the Respondent's defense with respect to Alexander is without merit.

Admittedly, Alexander was arrested during the strike and charged with assault. The matter came on for trial June 13, before the Municipal Court of Columbus, Ohio. By stipulation of the parties, the testimony of one Walter Lucas, one of the complaining witnesses against Alexander, as contained in the official transcript of the criminal proceeding brought against Alexander, was received in evidence as "a true, accurate and correct copy of the transcript" of this proceedings.[12] Alexander was acquitted of the assault and battery charges brought by Lucas as well as by one Robert Smith, both of whom testified in the proceeding before me as witnesses for the Respondent. Riley, who wrote the June 2 letter to Alexander, refusing him reinstatement because of his alleged "participation in violence during the course of the strike," was not examined with respect to the basis of his knowledge of the assertion made in that letter.[13]

The incident upon which the Respondent relies for not reinstating Alexander occurred on Saturday, Feb-

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[12] Rector's objection that the transcript had "no bearing upon this case" was overruled; in support of his objection he characterized the transcript of the Municipal Court proceeding as "a civil court transcript or record of the testimony that was taken" and added that the June 2 letter to Alexander was based upon "the information that reach the employer that he [Alexander] was involved in it [the fracas]" and "that he was refused" reinstatement for that reason.

[13] The Respondent produced as witnesses in support of the Respondent's refusal to reinstate Alexander, only the witnesses Lucas and Smith. Their testimony not only does not establish that they gave any information about the "fracas" to Riley, but for reasons briefly stated hereafter, I do not credit their testimony implicating Alexander.

ruary 25. During the preceding week, as Alexander credibly testified, Smith "was blocking our picket line and started calling us names . . . and pulled off his coat and was going to fight," but that he never had had any trouble with Lucas prior to February 25.

Smith and Lucas, both employees of Stoner Lumber Company, appeared at the Respondent's plant about noon on February 25, and, according to Smith's testimony on direct examination as a witness for the Respondent, the following occurred:

> Q. Could you explain what happened while you were out there?
>
> A. Well, we were sent out to pick up a forklift and, in the meantime, they were still using it, around noon, so we went on over to the Tip-Top to wait until they got finished.
>
> Q. By "we," who do you mean?
>
> A. Me and Mr. Lucas.
>
> Q. Okay, continue. What happened then?
>
> A. Well, we went into the Tip-Top Club—
>
> TRIAL EXAMINER. You went in where?
>
> THE WITNESS. The Tip-Top Club, 3-C Highway. We had us a drink in there, when these fellows all came in and jumped us.
>
> After that, we proceeded to go back and get the forklift and took it on back to the Stoner Lumber Company.
>
> By Mr. RECTOR:
>
> Q. What happened then at the Tip-Top?
>
> A. There were six or seven fellows came in and jumped us, and beat us up pretty good, and after that we went on back over to the lumber company. They called the police.
>
> Q. You say six or seven fellows jumped you?
>
> A. That's right.
>
> Q. Did you recognize any of them?
>
> A. Just two of them.
>
> Q. And who were the two you recognized?
>
> A. Richard Alexander and Bill Martin, William Martin.

Q. Did they strike any blows?
A. Yes, they did.
Q. Now, were these two, Alexander and Martin, arrested?
A. Well, we filed charges against them. They were arrested, yes, sir.
Q. And did you have a trial?
A. Yes.
Q. In court?
A. Yes, we did.

On cross-examination, Smith testifed as follows:

Q. Did you testify at the trial on the charges brought against Richard Alexander, by both you and Mr. Lucas?
A. Yes, I did.
Q. Were the charges which were brought against Mr. Alexander—Based on those charges, was he found not guilty?
A. I believe they found him not guilty.
Q. And do you know from your own knowledge that the charges Mr. Lucas brought against Mr. Alexander were also dismissed?
A. As far as I know.

Lucas, also a witness for the Respondent, testified on direct examination as follows:

Q. Were you out at the Linden Lumber Company during the strike?
A. Yes, sir.
Q. Could you tell us what happened?
A. Well, they sent me with Bob Smith, the forklift operator, out there to haul this thing down to our yard. There was a lot of shuffling going on out there. They couldn't get the trailer loaded right away. They were busy doing something else, so we walked over to the tavern and we had a highball, and we were sitting there drinking and talking and discussing things. We were close to the front door and this group of guys come in.

Well, naturally, we turned. I never thought anything about it. They walked by us, and we

kept on talking. Suddenly, there was a fracas and they had Bob on the floor, and Martin and Alexander were beating him and two other guys were there close, and I stood up. Bob got away from them. They were going toward the back door and I turned to see what had happened, and someone struck me in the back of the head with something. It left three cuts in the back of my head.

When I turned around, there were these fellows standing there, and somebody hit me in the ear, and I saw this one big fellow that I had seen on the sidewalk there with the rest of them fellows. He was coming at me, and I pulled my pocketknife out and told him that if he struck me I was going to use it on him, and someone hollered, "He's got a knife, let's go," and that's all. They left.

Q. Was that, then, the end of the fight?

A. Yes, sir.

TRIAL EXAMINER. What did you do next?

THE WITNESS. We went out the back door, the way we went in.

TRIAL EXAMINER. Then where did you go?

THE WITNESS. Over to the Linden Lumber Company.

TRIAL EXAMINER. And got the forklift?

THE WITNESS. Yes, sir. Well, we got the forklift and took it back to our yard. Of course, they called the police.

TRIAL EXAMINER. Who called the police?

THE WITNESS. Someone at Linden Lumber. I don't know who did. The cruiser came up and took a report on what happened. We took the forklift back to our yard, and our boss took us down to the hospital and to the police department to file assault and battery charges against Alexander and Martin, that's the only ones I know.

TRIAL EXAMINER. You had known Alexander and Martin?

THE WITNESS. I didn't know them real well. I had seen them in the line-up, walking along the sidewalk.

TRIAL EXAMINER. You had been out to the Linden Lumber Company before this Saturday morning during the strike?

THE WITNESS. I don't remember if I had been in there or not, before that, during the strike.

By Mr. RECTOR:

Q. Now, then, were you down at the court hearing on these charges?

A. Yes, sir.

Q. And did you testify?

A. Yes, sir.

Q. Did you know Melvin Bice?

A. Yes, sir, by acquaintance and seeing him during the strike. I don't know him personally.

Q. Did you observe him down at the court house?

A. Yes, sir.

Q. Was he in the Tip-Top when this assault went on?

A. No, sir.

On cross-examination, Lucas testified, in pertinent part, as follows:

Q. Now, you say, Mr. Lucas, that you testified. Was this relative to the assault and battery charges you filed against Mr. Alexander?

A. Yes.

Q. Mr. Lucas, do you personally know Mr. Alexander?

A. No, sir.

Q. Had you, prior to going into the Tip-Top Cafe on the day of the altercation, prior to that time seen Mr. Alexander?

A. Yes, sir.

Q. Where had you seen Mr. Alexander?

A. On the sidewalk . . . at the Linden Lumber Company.

Q. You were not really sure who it was that hit Mr. Smith and knocked him down?

A. That is right.

Q. You are not sure?

A. I seen Alexander and Martin beating on him after I turned around and saw him on the floor.

Q. How many guys were on top of Mr. Smith?

A. Martin, Alexander, and two other fellows were there close. I don't know if they had been or not, it all happened in a flash.

Q. You didn't know who had knocked Mr. Smith down?

A. I know Alexander and Martin were beating on him then.

Q. You don't know who had knocked Mr. Smith down?

A. I don't know who knocked him off the stool.

Q. Mr. Lucas, didn't you testify at the hearing on the assault and battery charges that you only recognized one of the fellows who was hitting Mr. Smith while Mr. Smith was on the floor?

A. I don't remember that.

Q. You don't remember testifying in that manner?

A. No.

Q. Isn't it a fact that you only recognized one of the fellows that was hitting Smith, and that was Martin, Bill Martin?

A. No, it isn't.

MR. SMEDSTAD: I have some questions.

By Mr. Smedstad:

Q. Mr. Lucas, you testified here that you cannot swear that it was Mr. Alexander that hit you, is that right?

A. That's right. I was hit from the back.

Q. And at the hearing that was held on the assault charges that you brought, isn't it correct that on examination from at least two different

attorneys that you testified that you did not know whether or not it was Alexander? Isn't that correct?

A. I think probably.

Q. Were you under oath at that hearing?

A. Yes.

Q. And under oath you testified that you really didn't know whether it was Alexander or not?

A. I think so.

In the criminal proceeding, brought by Lucas and Smith against Alexander, the following testimony by Lucas is pertinent, in my opinion, relating to his and Smith's visit to the Respondent's premises on February 25:

Q. Did you notice anything unusual about the premises of Linden Lumber Company?

A. I noticed there was a group of guys milling around, yes, sir.

Q. Could you tell what they were doing?

A. Some of them were sitting in cars, some of them just standing around talking.

Q. Notice any signs?

A. At that particular day, no, sir.

Q. All right. Did you recognize any of the men there?

A. Yes, sir.

Q. Who did you see?

A. I saw those two fellows there.

Q. Which two fellows?

A. Mr. Martin and Mr. Alexander.

Q. Had you known Mr. Martin and Mr. Alexander prior to that day?

A. Only just to see them around the Linden Lumber Company.

Q. Had you gone there previously?

A. Many times.

Q. Did you know them by name?

A. No, sir.

Q. Did you pick up the forklift at that time?

A. No.

Q. Why didn't you?

A. Well, the yard men were busy unloading the truck, so we backed the trailer into the loading dock and the group of fellows out there cursing and one thing and another—

Q. Cursing?

A. Yes, sir.

Q. Were they cursing at you?

A. I think so.

Q. Do you know why they were cursing at you?

A. I have an idea, because we were there. But we weren't doing any of their work.

Q. You mean it was a labor problem?

A. That's what I think.

Q. Where did you leave the truck?

A. In the Linden's yard.

Q. Where did you go from there?

A. We went over to a grill.

Q. You mean you and Mr. Smith?

A. Yes, sir.

Q. Why did you go over there?

A. Just to get out of their sight. We didn't want to create any disturbance. So, we walked away until the yard men had time to load this lift for us. They said it would be about a half hour or so.

Q. What did you do when you went over to the grill?

A. We got a highball, were sitting there talking.

Q. What happened then?

A. Well, we saw this group of fellows come in the door . . . I'd say from five—four or five—to seven, just a group of guys walking in the door.

Q. Did you recognize any of them?

A. No, sir; I didn't recognize them as their names. I know these two fellows . . .

Q. You mean Mr. Martin and Mr. Alexander?

A. Yes, sir. . . . Well, first thing I knew, they had Mr. Smith on the floor.

Q. How did he get there?

A. This Martin had hit him and another fellow; I don't know the other guy.

Q. What happened after Mr. Smith was struck?

A. I was struck at the back of the head, some instrument or something. I don't think anybody could have done it with their fist.

Q. Do you know who struck you?

A. Mr. Alexander.

Q. What happened then? What did you do?

A. Well, I started—I was dazed. I was trying to get off the stool, and I was struck again here two places. Broke my glasses and burst my ear inside. I had to have it sewed up, eight stitches in the back of my head. . . .

Q. Did you go to the hospital directly from the tavern?

A. No; we took the forklift back to the yard and came to the police station.

Q. In other words, you went back to the Linden Lumber Company?

A. Went back to the Linden Lumber Company; yes, sir.

Q. Did you see Mr. Alexander or Mr. Martin over there?

A. Yes, sir.

Q. Did you have any discussion with them at that time?

A. The police officer got Mr. Alexander and brought him inside, the police sergeant.

Q. Did you call the police?

A. They called them at Linden Lumber, someone I don't know.

Q. You don't know who called the police?

A. No, sir; I think it was probably the president of the company, Mr. Riley.

On cross-examination by counsel for defendants Alexander and Martin in the Municipal Court proceeding, Lucas gave the following testimony:

Q. In your prior trips over to Linden Lumber, did you notice this group of fellows milling around, as you said, around the gates?

A. On a couple occasions; yes, sir. . . .

Q. All right. How long have you been driving a truck?

A. Twenty-six years.

Q. In this twenty-six years, how many times would you say that you've been to lumber companies or different places?

A. Oh, gee, that's my job. Every day.

Q. Have you ever seen groups of fellows milling around any places that you'd been before?

A. Yes, sir.

Q. Do you know why they were there?

A. Only what I hear.

Q. What do you generally hear when a group of fellows are standing around?

A. Well, it could be a lot of things.

Q. What?

A. Could be a labor dispute; could be a personal grudge against the foreman. . . .

Q. Do you know what a picket line is?

A. I'd say so.

Q. Do you have any instructions on what you're supposed to do when you encounter a picket line?

A. Yes; but this was not a picket line.

Q. Oh, it's not?

A. No. There wasn't no union connected as far as I know. The company was union, and the men weren't union, as far as I know.

Q. How do you know that?

A. Only what I hear, I say.

Q. Who'd you hear that from?

A. Different fellows; I mean Linden Lumber themselves, representatives of Linden Lumber. And my superiors at Stoner.

Q. So, your superiors told you that this group of fellows weren't a picket line?

A. True.

Q. Did you see Smith pull a knife?

A. No.

Q. Did you pull a knife?

A. Yes.

Q. When did you pull a knife?

A. After I got enough bearings to get on my feet and saw this other guy coming at me.

Q. Who is the other guy?

A. I don't know. He was a big husky fellow. I wouldn't know who he was. I pulled this knife out of my pocket, and I said, "If you hit me one more time, I'll be forced to use it," and I didn't even have it open.

Q. Okay. Now you said that you were struck from behind.

A. That's right.

Q. Did you see the man strike you from behind?

A. I saw this group of guys come in through the door. When I turned around after the scuffle here, I didn't see this Martin. I mean, Alexander. So, I never saw him hit me, no, but I assumed that it was him. . . .

Q. There were anywhere from four to seven guys that could have thrown it?

A. That's right.

Q. You picked Alexander.

A. That's who the man said it was, Mr. Smith.

Q. Well, Smith said that's who hit you?

A. That's true.

On re-cross-examination in that proceeding, Lucas testified:

Q. Did you see Mr. Alexander strike Mr. Smith?

A. No, sir; I can't say that I did.

Q. Did you say the police arrived and then took Mr. Alexander and Mr. Martin down to the police station right then?

A. No, sir; I did not say that.

Q. Do you know when the police took Mr. Martin and Alexander to the police station?

A. No, sir.

Before me, Smith, recalled by the Respondent as a rebuttal witness, testified that he did not have a knife when the altercation occurred at the Tip-Top Cafe. Lucas, on rebuttal, answered to the same effect. He was not then asked whether he had a knife; however, in the Municipal Court proceeding he testified that he had with him, on February 25, "a Boy Scout knife," which he did not open but "had it out of my pocket, though."

Where the testimony of Lucas and Smith, on the one hand, differs from that of Alexander, I credit the latter.[14]

I find that the Respondent had no basis in fact for believing Alexander was a participant in violence to the extent that he is, by reason thereof, barred from reinstatement. Moreover, I find that the reason advanced by the Respondent for refusing him reinstatement is pretentious and, therefore, violative of Section 8(a) (3) and (1) of the Act.

D. CONCLUDING FINDINGS OF FACT AND OF LAW

Upon the basis of the foregoing findings of fact I make the following concluding findings and conclusions of law:

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[14] Melvin Bice, a striker who was reemployed and was working for the Respondent at the time of the hearing, credibly testified that he went to the Tip-Top Cafe with Alexander and Martin; that Smith, when Martin "got up and . . . went over . . . to talk to Smith" the latter "jumped up with a knife in his hand and Bill Martin hit him, and they got into a fight." He further testified, and I credited him, that Alexander made no physical contact with either Lucas or Smith. Martin admitted that he hit Smith "a couple or three times" when Smith "turned around with a knife" as Martin "asked him [Smith] to respect our picket line. . . ." He further testified, and I believe him, that he did not see Alexander attempt to or hit either Smith or Lucas, although he readily admitted that he "was busy" at the time with Smith.

1. At all times here material the Union has been and now is the exclusive representative of the employees in the appropriate unit heretofore found.

2. The Respondent by the actions of its representative, Labor Consultant Rector, at the February 3 meeting, and on subsequent occasions as previously found, as well as by the actions of General Manager Riley, unlawfully refused to bargain with the Union as the exclusive representative of its employees in the unit found appropriate, thereby violating Section 8 (a)(5) and (1) of the Act.

3. The strike which commenced on February 15, was caused by the aforesaid unfair labor practices of the Respondent.

4. Richard Marsh was at all times here relevant an employee of the Respondent and, when he ceased working on February 27, joined the strike and thereby became an unfair labor practice striker. When he sought to return to work during the latter part of March, the Respondent independently violated Section 8(a) (3) and (1) of the Act by refusing to reinstate him upon the ground, which I find lacking in merit, that he had quit on February 27.

5. I find that, for the reasons heretofore stated, Alexander was refused reinstatement for discriminatory reasons and not because he had allegedly participated in acts of violence during the course of the strike.

6. The aforesaid unfair labor practices are unfair labor practices burdening and affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, as alleged in the complaint in this consolidated proceeding, I shall recom-

mend that it cease and desist therefrom and take the necessary affirmative action to effectuate the policies of the Act.

Since the Respondent unlawfully refused to reinstate Marsh on February 27 and Alexander on June 1, when all the other strikers were upon application reinstated, it will be recommended that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements in order to provide work for them. It will also be recommended that the Respondent make them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by paying to each of them a sum of money equal to the amount he normally would have earned as wages from the date the unconditional application was effective, to the date of the Respondent's offer of reinstatement, less his net earnings during said period. The amount of backpay due shall be computed according to the Board's policy set forth in *F. W. Woolworth Company,* 90 NLRB 289, with interest on backpay computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation and in determining the right to reinstatement.

It will also be recommended that the Respondent bargain collectively with the Union and, in view of the nature of the unfair labor practices which I have found to have been committed, I shall further recommend that the Respondent cease and desist from in any manner interfering with its employees' rights guaranteed under Section 7 of the Act.

Recommended Order

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this proceeding, it is recommended that the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that the Respondent, Linden Lumber Division, Summer & Co., Columbus, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminatorily failing or refusing upon their unconditional request to reinstate any of its employees who have engaged in a strike and are lawfully entitled to reinstatement, or by discriminating against its employees in any other manner in regard to hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain with the above-named Union as the exclusive representative of its employees in the unit found to be appropriate for the purposes of collective bargaining.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

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(b) Notify the said employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of the employees in the unit heretofore found appropriate, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and to analyze reinstatement rights under the terms of this Recommended Order.

(e) Post at its premises in Columbus, Ohio, copies of the attached notice marked "Appendix."[15] Copies of said notice, to be furnished by the Regional Director for Region 9, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

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[15] In the event that this Recommended Order is adopted by the Board the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[16]

Dated at Washington, D.C.

IVAR H. PETERSON,
Trial Examiner.

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD AN IN ORDER TO EFFECTUATE THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT (AS AMENDED)

We hereby notify our employees that:

WE WILL NOT discourage membership in or activity on behalf of Truck Drivers Union Local No. 413, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily failing or refusing to reinstate any of our employees or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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[16] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing within 10 days of this Order, what steps Respondent has taken to comply herewith."

WE WILL offer Richard E. Marsh and Richard L. Alexander immediate and full reinstatement to their former positions, without prejudice to seniority and other rights and privileges.

WE WILL make the said Marsh and Alexander whole for any loss of pay suffered as a result of refusing to reinstate them.

WE WILL, upon request, bargain collectively in good faith with the above-named Union, as the exclusive bargaining representative of our employees in the unit found by the National Labor Relations Board to be appropriate for the purposes of collective bargaining, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement.

The bargaining unit is: All truck drivers, warehousemen, production and maintenance employees and yard men at the Respondent's facility at 1850 Dunune Avenue, Columbus, Ohio, excluding office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union or any other labor organization.

LINDEN LUMBER DIVISION, SUMMER & CO.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

NOTE: We will notify the employees to be reinstated, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684–3663).

TXD–273–68
Columbus, Ohio

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Cases Nos. 9–CA–4197; 9–CA–4283; 9–CA–4309

LINDEN LUMBER DIVISION, SUMMER & CO.

AND

TRUCK DRIVERS UNION LOCAL NO. 413, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

IVAR H. PETERSON, Trial Examiner: On January 26, 1968, I issued my Decision in this proceeding, finding that the Respondent had engaged in unfair labor practices violative of Section 8(a) (1), (3) and (5) of the Act. On April 15, the Board issued an Order, following receipt of exceptions and briefs, remanding the proceeding to me "for the purpose of making findings of fact concerning (1) the supervisory status of Henry Shafer, and (2) if a supervisor, the impact of Shafer's conduct on the validity

of the Union's majority, and for making any other or additional findings and recommendations based on the record, supplemented, if necessary, by evidence received at a reopened hearing."

Having further considered the matter, I conclude that it is not necessary to take additional evidence at a reopened hearing inasmuch as the record as presently constituted is adequate to permit the making of findings regarding the supervisory status of Shafer and the impact of his conduct on the validity of the Union's majority.

In my original decision I stated that it was unnecessary to determine whether Shafer was a supervisor and, further, that the evidence on this issue was inconclusive. Upon a further review of the record, I am now of the opinion that the evidence sufficiently establishes that he was a supervisor, and I so find. Aside from the conclusionary testimony of General Manager Riley and Assistant Manager Dunfee to the effect that Shafer was the mill foreman or mill superintendent and "supervised" two men, Ross and Beckelheimer, there is credible testimony of Robert Dupre, the dispatcher, and William Mason, a truck-driver who on occasion worked in the mill, that Shafer was the mill superintendent and a supervisor. Moreover, Smedstad, the Union's attorney, testified that on February 3, 1967, prior to the meeting concerned with the Union's representation petition, he discussed with Shafer the latter's duties and, after he (Smedstad) had submitted to the hearing officer a written request to withdraw the petition advised Shafer "that I thought the chances were good that the Labor Board would conclude that he was a supervisor." Smedstad further testified that he based his view in part upon the fact that Shafer, unlike Marsh, "had gotten a written set of instructions outlining what his super-

visory authority was." Considering all the testimony regarding Shafer's status, I am persuaded that it sufficiently establishes that he had and exercised supervisory authority, and I so find.

As to the second issue on which the Board has ordered that I make findings in the event I determine Shafer was a supervisor—"the impact of Shafer's conduct on the validity of the Union's majority"—the conclusion I reach is that the Union's majority is in no way tainted or impaired by reason of Shafer's having signed an authorization card or by any other conduct on his part as disclosed by the record.

The initial contact with the Union was made on December 28, 1966, by William Martin, then an employee, who telephoned Dow Norman, business agent and organizer of the Union. The next day Norman met with 11 employees and Shafter at a restaurant. All of them including Shafer, signed authorization cards. Norman credibly testified and I find that Shafer did not at this meeting address the employees. The Union made its demand for recognition by letter dated January 3, 1967, and filed its petition on January 5. There is no evidence that Shafer solicited any employees to sign authorization cards or to support the Union. Dispatcher Dupre did testify that Shafer, during the organizational period, "told me he hated Bill Dunfee, and he was going to get Dunfee, and that they were going to get the union in or he was going to quit." Yard Foreman Toops testified that Shafer talked about the Union and in that connection said, "they were out to get Bill Dunfee." Mason, a truckdriver, who did not attend the organizational meeting on December 29, and did not sign an authorization card, testified Shafer stated to him, "We are trying to get a union in here," but said nothing about Dunfee.

As heretofore found, Organizer Norman met with employees on February 4, the day after the aborted representation hearing at which Mr. Rector, on behalf of the Respondent, refused to recognize the Union or consent to an election, claiming that supervisors had coerced employees into signing authorization cards. Nine employees, as well as Shafer and Marsh, the two card signers whose status was in dispute were present. Norman at that meeting stated that since their status was in question Shafer and Marsh "would not be allowed to participate in this movement" and asked that they leave. The nine employees remaining were asked to read a document, which they then signed, affirming that they desired the Union to represent them, that each "has voluntarily signed" the document, and that each "believes the company would *not* want us to join" the Union. This document, together with the Union's request for recognition and a proposed recognition agreement, were given by Business Agent Norman to General Manager Riley on February 6. For the Respondent, Rector replied on February 8, refusing to recognize the Union, asserting that the Union's membership "includes supervisors . . . who influenced and dominated employees of the proposed unit," a position "made clear by the company at the NLRB hearing February 3, 1967," and further stating that "the company can not recognize your union so long as the supervisory influence exists." After receipt of this letter Norman, on February 9 or 10, called a meeting of the nine employees who on February 4, had signed the statement affirming their voluntary adherence to the Union, at which they read Respondent's February 8 letter and Norman explained that it meant that Respondent was refusing to accept the Union as the employees' bargaining agent. A strike vote was taken, by secret ballot, with the result that

the nine employees voted unanimously to strike. All of them, except Robert Beckelheimer, joined in the strike which began on February 15 and picketed the Respondent's premises.[1]

To summarize, I find that Shafer, a supervisor, attended the initial organizational meeting of employees on December 29, 1966, and signed an authorization card. There is no evidence, however, that he solicited employees or otherwise enlisted their support of the Union. He did tell one employee, Mason, that an effort was being made, which he supported, "to get a union in here"; Mason did not sign a card or support the Union. At the February 4 meeting Shafer, as well as Marsh, was told by Business Agent Norman that, in view of the Respondent's contention that he was a supervisor, he could no longer participate in union activities, and he and Marsh were asked to leave the meeting. Thereafter, the remaining nine employees signed a statement affirming that they voluntarily desired the Union to act as their collective-bargaining representative, and later voted by secret ballot to strike and all but one did engage in the strike. Assuming that an inference of supervisory influence in the procurement of authorization cards at the initial meeting on December 29, 1966, might be drawn from the presence of Shafer at that meeting, I am of the opinion that such an inference is negated by the subsequent action of he rank-and-file employees, after Shafer had been told in their presence that he could no longer participate, in affirming their designation of

[1] Beckelheimer quit on February 19. According to the Respondent, Beckelheimer took Shafer's position when Shafer quit on February 6. According to Yard Foreman Toops, Shafer told him the morning of February 4 that the Union "sold us down the river," turned in his keys to Dunfee, and stated that he quit.

the Union on February 4, and, after Shafer quit his employment, unanimously voting to strike. Accordingly, I find that the Union's majority status is not impaired or tainted by any conduct of Shafer.

Except with respect to my original findings that it was unnecessary to determine Shafer's supervisory status and that in any case the evidence relating thereto was inconclusive, which necessarily are modified as set forth in this Supplemental Decision, I adhere to the findings, conclusions and recommendations contained in my original decision herein, issued January 26, 1968.

APPENDIX D

Arthur F. Derse, Sr., President, and Wilder Mfg. Co., Inc. *and* Textile Workers Union of America, AFL-CIO. Case 2-CA-10823

October 21, 1968

DECISION AND ORDER

By Members BROWN, JENKINS, and ZAGORIA

On September 22, 1966, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent Company had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent Company had not engaged in certain other alleged unfair labor practices, and dismissed the complaint as to these allegations. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed a brief in support of the Trial Examiner's Decision and an answering brief to Respondent's exceptions and brief.

The Board [1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Ex-

[1] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

aminer's Decision, the exceptions, and the briefs, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herein.

As the Trial Examiner found, on the morning of October 12, 1965, Union represenatives Cohen and Hissam met with Walter Derse, secretary and general manager of Respondent Company, claiming to represent a majority of its production and maintenance employees and made a demand that the Company recognize the Union as the bargaining agent of these employees. The three men went into Derse's office whereupon Cohen repeated the demand for recognition and thrust 11 signed authorization cards in front of Derse. Derse replied that the Company was a corporation and he had no authority to answer the demand. Cohen continued to press for an answer and Derse replied that the officers of Respondent Company[2] would meet the next night and that the Union would have an answer on the day following.

The testimony is disputed as to whether or not Derse examined the cards. Derse testified that he did not pick up the cards, but that he shoved them aside and saw some signed cards and some blank cards.[3] Cohen testified that Derse went through the cards and was scrutinizing them throughout the conversation. Hissam testified that Derse picked up the cards and went through them one by one. Based on credibility resolutions, the Trial Examiner found that Derse did examine the cards. We find no reason to overturn the Trial Examiner's finding on this point.

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[2] Derse's two brothers and his father own all the stock of Respondent Company and are its officers.

[3] Cohen testified that two blank cards were included because two employees indicated that they were going to sign, but the Union hadn't as yet obtained their signatures.

Shortly after the conversation that same morning, the 11 employees who had signed cards stopped work and set up a picket line.[4] For approximately 8 months at least some of the employees continued to picket Respondent's plant.

On October 13, the officers of Respondent Company held a meeting and came to a decision that the Union did not represent a majority of its employees based on Derse's statement to his fellow officers that the Union had 10 or 11 cards and Respondent had 30 employees.[5] They then decided to retain labor counsel. On October 25, Union representative Rubenstein asked Derse if he had made a decision. Derse replied he had no comment to make and handed the representative a slip of paper with the name of the labor counsel on it. Rubenstein contacted the Respondent's attorney on October 27, and was told that the attorney had received no instructions from his client. The Union subsequently renewed its bargaining requests, but heard nothing further from Respondent.

The Trial Examiner found that the Union's majority status was proved when the Union, on October 12, presented Respondent with signed authorization cards from a majority of the employees in the unit and those employees struck and commenced picketing upon Derse's failure to grant the Union's initial demand.

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[4] Two more employees signed authorization cards and joined the picket line the next day.

[5] The Trial Examiner found that the appropriate unit consisted of 18 employees and that on October 12 Respondent Company knew that the Union represented an uncoerced majority of its employees in a unit appropriate for the purposes of collective bargaining by reason of Derse's examination of the union authorization cards and because the officers of Respondent Company observed and knew that a majority of its employees in such a unit had ceased work and were on a peaceful picket line patrolling the Company's premises.

In the circumstances, the Trial Examiner further found that Respondent could not have had a good-faith doubt of the Union's majority status and, therefore, that it violated Section 8(a)(5) of the Act by its failure to recognize the Union. We do not agree.

The Board has made clear that to establish that an employer's failure or refusal to grant recognition to a union on the basis of a card showing violates Section 8(a)(5), the General Counsel has the burden of proving not only that a majority of employees in the appropriate unit designated the Union as their bargaining representative, but also that the Employer in bad faith declined to recognize and bargain with the Union. This is usually based on evidence indicating that the Employer has completely rejected the collective-bargaining principle or seeks to gain time within which to unlawfully undermine the Union and dissipate its majority.[6]

In the present case, however, there is no showing whatsoever that Respondent had rejected the collective-bargaining principle or engaged in any interference, restraint, or coercion of employees to undermine the Union. Nor does the record show that Respondent has engaged in any other conduct which would prevent the holding of a fair election. We conclude, therefore, that the record does not preponderantly establish Respondent's bad faith in refusing to recognize the Union, and we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

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[6] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. 185 F.2d 732 (C.A.D.C.). Compare, however, *Snow & Sons*, 134 NLRB 709, enfd. 308 F.2d 687 (C.A.9).

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Trial Examiner: Upon a charge [1] filed by the Textile Workers Union of America, AFL–CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board by the Regional Director for Region 2 on May 9, 1966, issued an amended complaint and notice of hearing naming as the Respondents, Arthur F. Derse, Sr.,[2] President, and Wilder Mfg. Co., Inc., herein referred to sometimes as the Respondent Company or Respondent Employer. The amended complaint alleged that the Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, herein called the Act. The Respondent denied the allegations of the amended complaint by answer timely filed.

The foregoing case came on to be heard before me on June 7, 8, 9, 29, 30 and July 1, 1966, at Port Jervis, New York. At the hearing each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally upon the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been reviewed and considered by the Trial Examiner.

The principal question before the Trial Examiner is whether the employer was obligated to recognize and bargain with the Union upon a showing that an uncoerced majority of its employees in an appropriate

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[1] The charge was filed on November 4, 1965.

[2] Arthur F. Derse, Sr. owns a majority of the stock of the Wilder Mfg. Co., Inc. His three sons, Arthur F. Derse, Jr., Robert Derse, and Walter Derse, own the remaining shares.

unit had designated the Union as their bargaining agent.

Upon the whole record and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent Company is and has been at all times material herein a corporation duly organized, and existing by virtue of the laws of the State of New York, and at all times material herein the Respondent Company has maintained an office and place of business at Mechanic Street and Erie Railroad, in the City of Port Jervis, New York, where it is and has been at all times material herein engaged in the manufacture, sale and distribution of baking pans, bakeshop equipment and related products.

During the past year, which is representative of its annual operations generally, the Respondent Company, in the course and conduct of its business, purchased and caused to be transported and delivered to its Port Jervis plant, steel and other goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported and delivered to its plant in interstate commerce directly from States of the United States other than the State in which it is located.

The Trial Examiner finds, as is admitted, that the Respondent Company is now and has been at all times material herein engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.[3]

[3] The Trial Examiner deems it unnecessary for the purposes of this decision to resolve whether Arthur Derse, Sr., is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Textile Workers Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Alleged Violations of Section 8(a)(1) of the Act*

The sole admissible evidence cited by the General Counsel in support of the contention that the Respondent Company violated Section 8(a)(1) of the Act is the following testimony of employees Jack Munoz and Charles Shaw. From the testimony of Jack Munoz:

> * * * Walt said to tell us that any time we wanted to go back we could come back and send a committee of two men to go talk to Walt.[4]

From the testimony of Charles Shaw:

> Well I went down to get a couple of tires for my car from the locker room and we got on talking about the plant and he said there were some changes made that they had coffee breaks now that we didn't have before, and that the merit system was throwed out and that they were getting paid overtime for Saturdays * * *.[5]

Both statements were attributed to Supervisor William DeGraw.

A strike occurred at the Company's establishment on October 12, 1965. Picketing continued for about 5 or 6 months thereafter.

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[4] The General Counsel contends that this statement "constitutes an attempt to by-pass the employees' representative."

[5] The General Counsel contends that this statement "amounts to an attempt to induce Shaw and the other strikers to cease picketing by an offer of benefits."

DeGraw testified that about 2 weeks after the strike commenced, as he was on his way with his family to pick apples at his father-in-law's place, he saw Munoz' automobile parked at his home; he stopped to visit with him. While there, the DeGraws picked apples, discussed deer hunting and football and watched a part of a football telecast. During the course of the visit DeGraw asked Munoz "if he were going back to work." Munoz answered, "No, not without a union."

Munoz' testimony varied little from that of DeGraw except Munoz attributed to DeGraw the remarks set out above, to wit:

> * * * Walt said tell us that any time we wanted to go back we could come back and send a committee of two men to go to talk to Walt.

DeGraw specifically denied that he had made these remarks. Munoz agreed that he and DeGraw were friendly and visited at each other's homes. The visit lasted between 20 minutes and a half hour.

Employee Charles Lincoln Shaw, prior to the strike, had purchased an automobile from Supervisor DeGraw. Some time during March 1966 Shaw visited DeGraw for the purpose of picking up a "couple of tires" which belonged to the automobile. According to Shaw, he asked DeGraw whether it would be alright if he returned to work. DeGraw responded that he did not believe that Shaw would be fired and he could return to work if he "wanted to." According to DeGraw Shaw asked him whether "there was any chance of his coming back to work." DeGraw answered that "any one of the striking employees could come back to work, that the door was opened." Shaw responded, "Fine, probably be back on Monday." DeGraw testified that Shaw also asked him if any changes had been

made at the plant. DeGraw also testified that the parties had discussed overtime work.

Credible testimony indicated that the only change effected during the strike period was the establishment of a break time. Prior to the establishment of such break time employees were permitted to obtain a cup of coffee at any time during the workday and if they wanted to smoke "they would go to the men's room." As early as September 1964, DeGraw had recommended established breaks in lieu of this practice; however, established breaks could not be put into effect because the Respondent Company did not have a smoking permit from the State Department of Labor. Application was made for such a permit on October 12, 1964. The permit was granted after an appeal on July 1, 1965, upon condition that "[s]moking shall be permitted during the coffee break and lunch period." In accommodating the condition the Company was required to make certain alterations in its plant to provide an approved smoking area for its employees. These alterations were commenced in the latter part of 1965 and completed in the early part of 1966. Two 10-minute coffee breaks, one in the morning and the other in the afternoon, were then established.

The record is barren of any credible evidence that the "merit system was throwed out" or that there was any change in pay for Saturday overtime. Thus the record is lacking in proof that the employer did attempt to induce strikers to cease picketing by an offer of benefits and hence it is highly unlikely that DeGraw would have made the representations which were attributed to him by Shaw. Moreover, as between DeGraw and Munoz and Shaw the Trial Examiner credits DeGraw. In reaching this conclusion the Trial Examiner has considered the nature of the testimony, the demeanor of the witnesses, the environment in

which DeGraw's remarks were uttered, and the fact that the employer's policy was clearly one of avoiding the commission of any unfair labor practices. Measured by the allowable rights granted under Section 8(c) of the Act, the Trial Examiner cannot find that by DeGraw's conduct, as detailed in the Record [6] the Respondents violated Section 8(a)(1) of the Act. Dismissal of all allegations of the amended complaint based upon the alleged misconduct of Supervisor DeGraw is recommended.

B. The Alleged Violation of Section 8(a)(5) of the Act

1. The Union's showing of interest

William Hissam, a representative of the Union, met with 11 employees of the Respondent Company at his home on the evening of October 11, 1965. Present were Dominick Caliciotti, James Ehre, Fredrick J. Hicks, Harman B. Masker, Michael J. Molloy, Jack Munoz, Joseph Munoz, Arthur I. O'Hara, Charles L. Shaw, James E. Stempert, and Harold D. Vandermark. At the meeting each of the 11 employees signed a union authorization card [7] and approved a motion by signing his name below the following lan-

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[6] The Trial Examiner has considered all evidence in the Record involving DeGraw.

[7] The card contained the following language: "I hereby accept membership in the Textile Workers Union of America of my own free will and do hereby designate said Textile Workers Union of America as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." Signatures on the cards were properly authenticated for the record either by the acknowledgment of the signers under oath or by the credible testimony of a witness who observed the signing of the card.

guage: "Upon asking employer for recognition, and upon his refusal there is a motion among the people present to go on strike."

On October 12, 1965, these 11 cards were presented to Walter Derse, secretary and general manager[8] of the Respondent Company, who thereupon did not recognize the Union as the statutory bargaining agent of its employees. Upon being so advised the 11 employees, who had reported for work on the morning of October 12, 1965, left their jobs and set up a peaceful picket line in the vicinity of the Respondent Company's premises.

The Trial Examiner finds that on October 11, 1965, 11 employees of the Respondent Company had designated and selected the Union as their bargaining agent.

On October 12, 1965, H. Hernsdorf of his own free will signed a union authorization card[9] in response to a request by a picket as he left the employer's plant at noon. Hernsdorf joined the picket line and picketed on October 12 and the following day. He remained away from work for several months thereafter.

On October 12, 1965, Irving Hughson signed a union authorization card "[b]y the picket line." Thereafter Hughson remained away from work until January 20, 1966.

The Trial Examiner finds that by the afternoon of October 12, 1965, 13 of the Respondent Company's employees had designated and selected the Union as their bargaining agent.

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[8] As general manager, Derse testified that he was responsible for "the entire operation, the sales, the advertising, production and all problems relating to anything of this nature."

[9] There is no competent credible proof that Hernsdorf was coerced into signing the card on October 12, 1965.

2. The Appropriate Unit

The amended complaint alleges that the appropriate union for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All production and maintenance employees of Respondents, employed at its Port Jervis plant, exclusive of draftsmen, office clericals, plant clericals, guards, watchmen, professional employees and all supervisors as defined in Section 2(11) of the Act.

The parties stipulated that there were 30 employees on the Respondent Company's payroll as of October 12, 1965, "with the exception of the executive officers."[10] By consent of all parties the following 18 employees appearing on the October 12 payroll were included in a unit of production and maintenance employees: Roger Burcham, Dominick Caliciotti, James Ehre, Frank Griggin, Hilmut Hernsdorf, Fred Hicks, Irving Hughson, Harmon Masker, Michael Malloy, Jack Munoz, Joseph Munoz, Arthur O'Hara, Don Shafer, Charles Shaw, Allen Smith, James Stempert, Frank Tonkinson and Harold Vandermark. The parties further agreed that Jack McCaslin,[11] plant manager, and William DeGraw,[12] supervisor of the machine department, should be excluded as supervisors and that Jean Clark, Shirley Hawkins, and Patricia Somarelli should be excluded as office clerical employees. The Respond-

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[10] The executive officers of the Respondent Company were Arthur F. Derse, president; Walter Derse, secretary; Arthur Derse, Jr., vice president; and Robert Derse, treasurer.

[11] Of McCaslin's duties Walter Derse testified, "Jack McCaslin is in charge of the production department. He handles the assembly and he is over Bill DeGraw * * * He is responsible to me and only me."

[12] Of DeGraw's duties Walter Derse testified, "Mr. DeGraw is the foreman in the machinery department, and takes over in Jack McCaslin's absence, of the entire production."

ent Company contends that the seven employees remaining on the payroll list of October 12, 1965, should be included in the appropriate unit.[13] The General Counsel maintains that the seven employees [14] should be excluded from the appropriate unit.

The Respondent Company's plant is located at Mechanic Street and Erie Railroad, Port Jervis, New York.[15] A brick wall separates the factory or production section of the plant from the general office area. The factory area or section contains a machine shop, welding department, assembly area, machinery area, packing area, receiving area and raw storage, and warehouse and shipping area. The shipping area, warehouse and receiving area and raw storage are separated from the remainder of the factory section

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[13] Since the Respondent's proposed unit is composed of 25 employees it is apparent that the Union on October 12, 1965, held valid authorization cards (13 in number) for a majority of the employees in each unit.

[14] These employees were Chester Swingle, Harold Lauer, Earl Clark, James Wharton, Francis May, Carol Forbes, and Yvonne Flannery.

[15] Walter Derse describe the Respondent Company's business as follows:

"We manufacture steel baking equipment. We start with raw material that is in the form of sheets, angle iron. Such finished hardware as casters, bolts, et cetera.

"This material is sheared and blanked, punch formed, and then assembled in various ways, either spot welding or electric welding, Healy arc welding, Baum riveting.

"Some items go out unassembled. They get shear knocked down, and the ultimate form of this equipment is in work benches for bakeries and ingredients containers and ingredients drawing units, flour, sugar and items of this nature, pan racks for the storage of pans and bake goods, dolleys for pans and bulk racks, cabinets for the raising of doughs and items of that nature.

"They are basically used in various types of retail or small type bakery operations or bakery departments * * *"

by a wall. An enclosed production office is located in the assembly area where McCaslin is located. No clerical type employees are assigned to the production office. The general office contains partitioned spaces, ceiling high for the president's office, treasurer's office, secretary's office, vice president's office, accounting department and layout department. Bounded on one side by the wall separating the factory section from the general office and by the president's office, accounting department, lobby, treasurer's office, secretary's office, vice president's office, and layout department is an area designated as the corridor and file room. Each of the above-mentioned offices and departments has doors opening into this area.

Of the seven employees whose classifications are in dispute six are assigned to the general office area. Swingle works in the factory area. The three excluded office clericals are also assigned to the general office area. Employees Lauer, Wharton, and Clark worked in the layout department; May's desk was located in the corridor and file room adjacent to the layout department. Clark's desk was located in the corridor and file room next to the secretary's office door. Hawkins' desk was adjacent to and in front of Clark's desk. Flannery and Forbes were located at the end of the corridor and file room nearest the president's office and accounting department. Somarelli worked in the accounting department.

The corridor and file room contained file cabinets, desks, chairs, adding machines, typewriters, a calculating machine, a Xerox machine and a storage, cabinet. Partitions in this area were 54 inches high.

The general office and factory areas have separate entrances. Employees working in the general office area normally use an office entrance while employees working in the factory area use the factory entrance

which opens onto a parking lot. Separate timeclocks are maintained for each group of employees. Employees working in the factory area wear a different kind of apparel than those assigned to the office area. Office and factory employees do not work like hours.[16] Jack McCaslin, plant manager, who is the senior supervisor over the employees who work in the factory area, exercises no supervisory authority over the employees who are assigned to the general office area. Employees are not interchanged between the factory area and the office area. Employees in the office area receive their instructions principally from Walter Derse, Robert Derse, and Arthur Derse, Jr.

The duties of Harold Lauer, Earl Clark, and James Wharton: Lauer, Clark, and Wharton work in the layout department which was also referred to by Lauer as the engineering and estimating department. Lauer testified that he was "[h]ead of the engineering and estimating department."[17] Walter Derse testified that while the department is under his "command" he looks to Lauer "to see that the other men [take] care of the job." Lauer[18] described his duties as follows, "any requisitions[19] that I receive from the sales

[16] Derse testified that the production and maintenance employees punch in at 8 a.m. and out at 4:45 p.m. and have 45 minutes for lunch; that the girls in the office punch in at 8:30 a.m. and out at 5 p.m. and apparently have an hour for lunch; that Lauer, Wharton, and Earl Clark punch in at 8 a.m. and out at 5 p.m. with an hour for lunch, and that May punched in at 8 a.m., out at 5 p.m., with an hour for lunch.

[17] Lauer testified, "I have two men that work directly under me, Earl Clark and Jim Wharton."

[18] Lauer's testimony is credited in connection with the functions and duties of the employees in the layout department.

[19] A requisition is a form made up by Frank May when items required to fill a customer's order are either not in stock or when by filling the order, the number of such items in stock will fall below a minimum figure.

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department have to be processed under my direction. Sometimes I do the work of processing these requisitions, most of it is carried out under my direction by Wharton and Clark. This would mean laying out[20] the jobs, preparing any necessary drawings. I also have to follow through any item, catalogue item, that is under redesign or is of new design, also any prices of special items, noncatalogue items or special items. I figure the prices on them and also the perpetual pricing system that is set up for all catalogue items is under my direction." Lauer also testified that he spent his time "[d]elegating the work to be done,[21] checking out what work has been done, checking into new design provisions, work of that type." Lauer also said he worked "on planning into designs and designing into equipment."

Lauer is an associate engineer, a graduate of Pennsylvania State University.

Lauer testified that he normally performed his duties in the "engineering office" and did not work in the factory areas; however, upon occasion he went into the plant. Occasionally one of the Derses summoned him to the plant to show him "something that should be changed on an item or a problem that [had] arisen." Sometimes he was called into the plant by McCaslin or DeGraw about a problem. These problems

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[20] Lauer described "layouts" as "necessary papers for men in the factory to produce catalog items or special items" and entailed "any cutting sheets, shearing sheets, fill in cards, wood working sheets, any necessary drawings, mechanical drawings, made in proportion." According to Lauer he reviewed this kind of work and assigned it to Wharton or Clark. When it was completed it was returned to his desk for checking.

[21] Lauer testified "I assign their work, what has to be done, I tell them [Clark and Wharton] what to do first, and if there's any question arises while they're doing it, I try to answer that."

were described by Lauer as "[u]sually a production problem or an item being made. Could be they have to substitute material, sometimes we run short of material, there could be a mistake in the engineering layout, there could be a mistake in the drawing, something of that type." Chester Swingle, who was in charge of the warehouse, receiving, packing and parts department, consulted Lauer about packing and bill of parts problems. Lauer's visits to the plant were brief and intermittent; he noted the problem on a pad and resolved it in the layout department if it could not be "taken care of immediately." The record is barren of any evidence that Lauer in the course of his duties contacted non-supervisory factory personnel.

Lauer testified that Wharton and Clark work in the engineering office and each has "their own drafting board with a drafting machine attached to the board, they have architects and engineers scales, mechanical drawing pencils, mechanical sharpeners and any necessary drafting instruments." Lauer said that they were not "full-time draftsmen" [22] but only performed drafting work when the work required drafting to be performed. Besides draftmen's work, Lauer said that Wharton and Clark "do lay out, filling in the sheets, items to be made." Clark in addition to job layouts and drafting "takes method photos" and "catalog photos." Both Clark and Wharton use drafting machines, scales, dividers, and compasses in the normal performance of their duties which are performed at their "own drawing boards" in the "engineering office."

According to Lauer, Clark had no technical schooling in drafting; his knowledge of drawing and draft-

[22] Lauer defined a draftsman as "either a man or woman having the knowledge to use a drafting machine, engineer scales and be able to draw architectural or mechanical scales."

ing had been acquired through experience. Wharton had mechanical drawing in school and attended Orange County Community College where he took a course in drafting.

While Clark normally performed his work in the engineering department at least once a month he went to "the factory to take any photographs of a particular method or way a job is done" for engineering recording. On these occasions he might spend 20 minutes to a half hour in the plant. Clark also had occasion to carry papers in reference to a "quickie job" to the production department. These trips consumed a "few minutes." Wharton also delivered papers to the production department for jobs which were not run through a regular shop order. As did Clark's trips, these trips consumed a few minutes.

The duties of Frank May: Frank May was designated as an inventory control clerk and maintained the inventory control file. May is responsible to Walter Derse.

As orders were received, Jean Clark, an excluded clerical employee, placed them in an order pan where they were picked up by May who interpreted them and checked them with the catalog to make sure that the order was correct. May then made up a return makeup order sheet, checked the inventory to make certain the items ordered were available by consulting a master inventory list by his desk, and reserved the inventory. If there were insufficient items in stock to cover the order or if the order brought the amount of stock below the minimum or if it was an item made up on order only, May made out a requisition in longhand which he delivered to the layout department for Lauer's review. The requisition was then typed by Flannery.

When the items were in stock, the order was typed from the makeup order. May then checked the typed copy with the makeup order and if it was correct he removed the shipping order copy. Shirley Hawkins, an excluded clerical employee, typed labels and bills of lading which she delivered to the shipping department together with the shipping order copy.

May occupied a desk adjacent to the layout department opposite the vice president's office. No partition surrounds his station. According to Derse, May spent 75 percent of his time at his station and the remainder in the plant; however, other testimony which seems more plausible indicates that May spent 5 or 10 minutes a day in the plant. There is no evidence that May worked in the factory. May's only activities in the factory described in the record concern his traveling to the shipping area to pick up the shipping department's copy of the orders together with the first and third copy of the bill of lading which he brought to his station.[23]

The duties of Carol Forbes: According to Walter Derse Carol Forbes was responsible to him although Lauer "makes sure she carries out the proper distribution of the forms and makes sure that the operational cards and any papers relevant to the production are carried out in the right form." Forbes received envelopes containing orders and layout forms from the layout department. She then prepared the operational timecards required for each order and added them to the documents already in the production envelope. Forbes also was required from time to

[23] Derse testified, "They [May and McCaslin] discuss . . . what may be coming through the plants, and Frank will then, based upon this conversation with Jack, he will make his moves, so his moves in many cases are dependent upon what Jack McCaslin tells him."

time to run the Ozalid machine located in the layout department in order to duplicate operational timecards. Forbes spent approximately 70 percent of her time preparing the operational timecards. She also prepared method sheets which she received from the layout department. These method sheets are taken by her to the production office where they were stored.

The duties of Yvonne Flannery: Yvonne Flannery was an inventory clerk for raw materials. She was responsible to Walter Derse. She also typed shop orders. In performing the function of inventory clerk for raw materials she entered shipments received and maintained a master file of raw materials. On occasion she would consult with Plant Manager McCaslin about material, particularly if there was a question concerning the type of material which had been received.

The duties of Jean Clark, Shirley Hawkins, and Patricia Somarelli:[24] *Jean Clark:* Jean Clark who had been employed by the Respondent Company for a period of 11 years was a clerk-typist. She was the confidential secretary to Walter Derse. In the morning and afternoon she opened the mail and distributed it. She also wrote up sales orders and checked sales orders written by employee Hawkins. She handled all correspondence. Once a day for 5 or 10 minutes she delivered shipping papers to the shipping and receiving department. *Shirley Hawkins:* Shirley Hawkins worked in the sales department in the general office area. She wrote the main part of the sales order, figured the pricing, handled some correspondence and typed envelopes. On occasion she would take shipping papers to the shipping and receiving departments. *Patricia Somarelli:* Patricia Somarelli worked in the accounting department. According to Derse she spent

[24] The duties of the excluded clerical employees are reviewed in order that the unit question may be viewed in full perspective.

the first hour and a half of every day in the production office checking the operation and payroll cards which were delivered to Carol Forbes for recording the operation time. At the end of the week Somarelli prepared the payroll from the timecards. Somarelli also prepared accounts payable and receivable, prepared bank deposits and wrote checks.

The duties of Chester Swingle: According to the testimony of Walter Derse, Swingle was "in charge of the warehouse, receiving, packing and parts department." Swingle "told [employees James Stempert and Arthur O'Hara] what to do"[25] and was "basically" in charge of their activities.

Derse testified that he "looked on [Swingle] as a supervisor." Swingle and Plant Manager McCaslin were "responsible for checking final production." Swingle "on occasion" answered to Walter Derse; on other occasions he answered to McCaslin. Swingle received a higher rate of pay than the employees, Stempert and O'Hara. Swingle worked alone about half of the time. When Stempert and O'Hara worked with him, Swingle also physically worked at packing and shipping. Stempert and O'Hara reported to Swingle each day. If Swingle had no work for them he turned them over to McCaslin.

The Trial Examiner is of the opinion that Swingle responsibly directs employees of the Respondent Company and that the exercise of such authority was not of a merely routine or clerical nature but required the use of independent judgment. The Trial Examiner finds that Swingle is a supervisor within the meaning of Section 2(11) of the Act. The Trial Examiner is of the same opinion in respect to Harold Lauer and finds that Lauer is a supervisor within the meaning

[25] Derse testified "If he [Swingle] wanted them to pack they packed, if wanted them to cut up a little they cut up a little."

of Section 2(11) of the Act. Thus Swingle and Lauer must be excluded from any unit.

As to the other five employees whom the Respondent would include and the General Counsel exclude from the appropriate unit, it is the opinion of the Trial Examiner that they should be excluded from the appropriate unit in that a community of interest is lacking between these five employees and the conceded production and maintenance employees. Of controling importance in reaching this conclusion are these factors: (1) no working contacts exist between the five employees and the production and maintenance employees, (2) common supervision is lacking, (3) working conditions are dissimilar, (4) skills and functions of the two groups of employees differ, (5) substantially all the work of the five employees is performed in the general office area in close proximity with excluded office employees and the administrative officers of the Respondent Company, (6) the five employees are under the same general supervision as the excluded clerical employees, (7) the five employees perform work closely related to that of employees usually excluded from production and maintenance units, (8) the work of the five employees is not directly integrated with the production process, and (9) a community of interest prevails between the five employees and the excluded clerical employees.

The Trial Examiner finds that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act.[28]

[28] The Trial Examiner considers this unit to be substantially the same as the unit set forth in the amended complaint.

3. The Union's demand for recognition and the Respondent's refusal to recognize the Union

Between 9:30 and 10 on the morning of October 12, 1965, Cy Cohen [27] and William Hissam, representatives of the Union, made demand upon Walter Derse that the Respondent Company recognize the Union as bargaining agent. According to Derse he arrived at the Company's plant at about "25 minutes to 10:00" and was advised that a Mr. Cohen wanted to see him but would not state his business. About 5 minutes later Cohen appeared in the lobby but again would not state his business. Upon receiving this information from Yvonne Flannery, Derse went to the lobby. Cohen introduced himself and Hissam and said, "We're from the Textile Workers Union. We have something of material interest." Derse said "What do you mean." Cohen replied, "We represent a majority of your employees,[28] and we want to know whether you will recognize us as their bargaining agent." Whereupon Derse invited Cohen and Hissam into his office where all three sat at a small conference table, "two and a half feet by four." Cohen "shoved" the authorization cards in front of Derse but Derse did not touch them.

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[27] Cy Cohen had been employed by the Union for "[t]wenty odd years."

[28] Derse denied that the term "production and maintenance employees" had been used. Both Cohen and Hissam testified that Cohen informed Derse that the Union represented a majority of "production and maintenance employees." The Trial Examiner credits the testimony of Hissam and Cohen in this respect as well as the other material portions of their testimony which is in conflict with that of Derse. These credibility resolutions are not only drawn from the demeanor of the witnesses, but it seems plausible that a union representative such as Cohen with "20 odd years" experience would not have overlooked demanding recognition in a "production and maintenance unit."

Cohen repeated the purpose of his visit and Derse replied, "Mr. Cohen, this is a corporation, and I have absolutely no authority to answer that question." Cohen inquired, "In other words, you refuse?" Derse answered, "I didn't refuse. I said I did not have authority to answer that question." Cohen responded, "* * * if you refuse, we'll file unfair labor practice charges." Derse said, "There's nothing I can do about it. I have no authority." Cohen continued to press for an answer and Derse said that he "could have an answer on Thursday" [29] at which time his one brother (Arthur Derse) would have returned from Atlantic City. Derse indicated that the officers of the Respondent Company would meet on Wednesday night. Cohen said, "I can't wait that long * * * I have to know. I will give you an hour. Would you rather have the men wait outside." [30] Derse replied, "I can't do anything about it, I can not answer the question you ask me." Cohen again "shoved" the cards toward Derse who did not pick them up. Derse testified that he "moved them aside" and saw some signed cards and some blank cards. Cohen said, "Yes, there are blanks in there." [31] At this point Cohen asked if he could "talk to the men

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[29] Derse's affidavit to the Board does not reveal that Derse had told Cohen that he would have an answer by Thursday. In any event the Union received no answer.

[30] In his affidavit to the Board Derse averred, "Cohen said he could not wait until the next day for answer, he could wait an hour or otherwise he would pull the men out on strike."

[31] Cohen testified that he laid the cards on the table in front of Derse. Derse picked them up and "went through them." Derse noticed two blank cards and "questioned" them. Cohen told him that the cards were "in there because two people . . . signified they were going to sign." and the Union "hadn't been able to get their signatures as yet." Cohen testified that Derse was "scrutinizing" the cards "all during the conversation" and that "he put them down once and picked them up again."

outside." Derse replied that he had no authority "to let [him] inside to talk to these men." Cohen then asked whether he could place a phone call to the men. Derse explained that emergency calls were permitted. Thereupon Derse "took the cards" and "shoved them back." Cohen picked up the cards [32] and left. It was then about 10:10.

At 10:25 a phone call was placed through the plant switchboard to Jack Munoz. At 10:26 the 11 employees who had signed cards punched out and left the plant. At 10:26 Cohen phoned Walter Derse and according to Derse said that "their boss (Mr. Rubenstein) said they could not wait, that they were going to pull them men out." Derse replied, "Nothing I could do about it."

Derse testified that by late night of October 12, 1965, he had contacted all the officers of the Respondent Company including Arthur Derse, Jr., who had been in Atlantic City and suggested that they get together on Wednesday night, October 13, 1965.

On October 13 at 11:25 a.m. Derse received a telephone call from Cohen. According to Derse, Cohen asked him if he had made up his mind. Derse answered, "No, my brother had not as yet returned, that I couldn't talk to him,[33] that we would get together that night and I could only answer him the next night. That was the earliest I could tell him." Cohen wanted Derse again to "agree to recognition " Derse answered that he "couldn't do it until a decision was made." [34]

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[32] Derse testified that he "would judge that there was, including the blanks, probably fifteen cards," but that he did not know how many blanks were among them.

[33] Derse admitted that this statement to Cohen was untrue.

[34] Derse denied that Cohen mentioned that he held two additional authorization cards. Cohen testified that he called Derse on October 13, 1965, and asked him if he had heard anything

The meeting of the Respondent Company's officers was held on Wednesday night. According to Derse the officers came to a decision that they doubted the majority based upon Walter Derse's statement. "It looks to me like about ten or eleven, and we're thirty-four people. Dropping us four as officers we still have thirty. Now, simple mathematics, eleven is not a majority of thirty . . ." [35] The officers decided to retain counsel, a labor specialist.[36] Derse contacted and retained Friedlander, Gaines, and Ruttenberg on October 19, 1965.

On October 25, 1965, Derse testified that as he was driving in the Company's parking lot Jack Rubenstein, a union representative, asked him whether he had made a decision. Derse answered, "I have no comment to make" and handed him a slip of paper with the names and phone number of Friedlander, Gaines

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from his brothers. Derse answered, "No." According to Cohen, he told Derse, "As a matter of form I am asking you for recognition once more. I have additional cards I expected yesterday. I have them to-day." Cohen requested an answer as "quickly as possible" and suggested that he call Derse later. Derse replied, "If you want to call, call, if you don't, don't."

[35] Derse testified that he included all the employees in the thirty "because . . . what Mr. Cohen told me, was that they represented a majority of our employees." As noted above the Trial Examiner has found that the Union requested representation in a production and maintenance unit. Thus there was no basis for Derse's assertion that the Union desired to represent all thirty employees. Moreover, the Trial Examiner is not convinced that Derse was so unschooled in labor matters as to believe that the Union was seeking to represent Plant Manager McCaslin, Supervisor DeGraw, or the office clerical employees whom the employer conceded should be excluded from an appropriate unit. Furthermore at the time Derse's remarks were claimed to have been made, he was aware that only production and maintenance employees had joined the strike.

[36] Derse had contacted a local attorney on October 12 who told him he should make no further comment or do anything about the situation but to seek a competent attorney.

and Ruttenberg. Rubenstein was told to contact these attorneys.[37]

Between October 13 and October 25 the Respondent Company did not contact the Union or thereafter. The matter has remained in the same status in respect to union recognition as it was on October 12, 1965. Throughout the strike the employer maintained an open door policy toward the strikers. The Company remained out of production for about 30 days. On December 30, 1965, the employer wrote a letter to the striking employees in which the employees were reminded "that the door has always been open for your return." The letter highlighted the "past performance of the company" in contrast with the "unfilled promises you have received from outsiders or strangers." The employer commenced hiring new employees on January 3, 1966. Seven employees have returned to work.[38] One employee refused to come back because he wanted more money. On January 4, 1966, the employer wrote the striking employees again reminding them that the "door is open to you" and that "you have not had to pay dues and initiation fees to get and keep your job at Wilder." The letter was closed with the statement "There is no need to lose further wages while waiting for a satisfactory settlement of

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[37] Rubenstein testified without contradiction that he contacted the Respondent Company's attorneys on October 27, 1965, and was told that the attorneys had received no instructions from their client. Rubenstein heard nothing further from the attorneys.

[38] Frank Tonkinson (Frank Tonkinson remained away from work several weeks after the strike commenced) and Irving Hughson returned in January 1966. Charles Shaw followed in the latter part of March or early April. Stempert, Ehre, and Hicks returned in the latter part of May 1966. Vandermark returned in June 1966. Hernsdorft returned for a day and a half in January 1966.

the present problem." The picket line remained for about 5 months within full view of persons passing in and out of the Company's establishment.[39]

Upon the basis of the foregoing testimony and in line with the Trial Examiner's credibility resolutions, the Trial Examiner finds that on October 12, 1965, the Union presented to the Respondent Company a claim to be recognized as the representative defined in Section 9(a) of the Act and that on such date and thereafter the Respondent Company knew that the Union represented an uncoerced majority[40] of its employees in a unit appropriate[41] for the purposes of collective bargaining by reason of Walter Derse's examination of the union authorization cards, and because the officers of the Respondent Company observed and knew that a majority of its employees in such unit had ceased work and were on a peaceful picket line patrolling the Company's premises.[42]

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[39] There is competent and credible testimony supporting a finding that all the Derses in passing to and from the Company's establishment had an opportunity to observe the picketing commencing on October 12, 1965 and the employees on the picket line.

[40] The record is barren of any competent credible evidence that on October 12th or 13th any of the 13 card signers were unlawfully coerced into signing the union authorization cards or joined the picket line because of unlawful coercion.

[41] If a good-faith doubt as to the appropriateness of the unit were claimed by the Respondent employer, such claim would not lie since a good-faith but erroneous doubt as to the appropriateness of the unit is not a defense to an otherwise meritorius charge of a refusal to bargain. *Southland Paint Company, Inc.*, 156 NLRB 22; *Owego Street Supermarkets, Inc.* 159 NLRB 1735.

[42] Derse testified that Cohen produced "probably fifteen authorization cards (two were blank) at the October 12th demand. Derse reported to the officers on October 14, 1965 that 10 or 11 employees were on strike. The Respondent conceded that 11

Thus unless the Respondent Company for some lawful reason was excused on October 12, 1965, from recognizing and bargaining with the Union as the statutory representative of its employees, it became so bound. "An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." *N.L.R.B.* v. *Dahlstrom Metallic Door Co.,* 112 F. 2d 756, 757 (C.A. 2). "Convincing evidence of majority support" was presented to the Respondent employer on October 12, 1965, when the Union offered for the employer's examination the valid union designations of a majority of its employees in an appropriate unit and when a majority of the employer's employees in such unit engaged in strike and appeared as a peaceful picket line at its premises. The voluntary walk out of a majority of the employer's employees and their peaceful picketing thereafter stand in the record as unrebutted notice of the Union's majority status and a confirmation of the authenticity and uncoerced character of the union designations.[43] Nevertheless, although the Union reiterated its demand for bargaining by letters dated November 3 and 5 and December 27, 1965, and January 6, 1966, and filed a refusal-to-bargain charge on December 4, 1965, the record discloses no evidence that the employer advised the Union of the basis for its

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employees walked out of the plant on October 12th. Employee Munoz credibly testified that while the 11 pickets were on the picket line on October 12th, the picket line was observed by at lease one Derse. Hissam credibly testified that when the 11 employees ceased work and left the plant they all commenced peacefully picketing with signs reading "On Strike. Textile Workers Union of America" and that while the 11 were picketing all the Derses went "by."

[43] All of the union authorization card signers appeared on the picket line.

failure to respond to the Union's bargaining demand [44] or that the employer sought to avail itself of the provisions of Section 9(c)(1)(B) of the Act.[45] Under these circumstances, as we said in *N.L.R.B.* v. *Preston Feed Corporation,* 309 F. 2d 346, 351 (C.A. 4): "* * * it is a little short of absurd for an employer to express doubt as to representative status of a union when the majority of the employees had gone on strike under its guidance." When a doubt does not exist, *a force,* a defense of good-faith doubt is lacking in merit and is wholly superfluous. Indeed it is sheer fiction to indulge the defense of good-faith doubt where doubt

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[44] On December 2, 1965, Union Representative Jack Rubenstein sent the following letter to the employer:

"Because of my inability to arrange a conference for the purpose of receiving recognition and entering into collective bargaining with your company which represents the majority of your employees, proof of which has been presented to you, I have found it necessary, at this time, to bring charges against your company for refusal to recognize the union's majority position in the plant.

"Likewise I called the legal firm whose address you gave us, namely Friedlander, Gains & Ruttenberg, 221 W. 57 Street, and spoke to Mr. Ruttenberg. I was unable to get any positive commitment from him regarding our union's recognition or as to any positive statement as to your company's willingness to sit down and meet with the union.

"The company's failure to act in accordance with the provisions of the law which requires the company to recognize the union representing the majority of the company's employees leaves the union with no other recourse but to proceed with the charges as filed.

[45] Section 9(c)(1)(B) of the Act provides for the filing of a petition "by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; * * *."

cannot exist [46] as in this case. Had the Respondent Company been inclined to accommodate the statutory purpose it either would have responded to the Union's request by putting to rest its purpose for ignoring the Union's demand [47] or it would have availed itself of Section 9(c)(1)(B) of the Act. Having done neither, the Respondent Company depicted an absence of good faith and a disposition to avoid the Act's directives. Rather the employer strove to test its employees' economic ability to foist union recognition upon it even though it well knew that its employees had designated the Union as their statutory bargaining representative. Thus its chosen course of conduct was a cause of industrial conflict and ran counter to the purposes of the Act to eliminate the causes of industrial strife.

The Respondent Company argues that its chosen course of conduct was not unlawful. The employer claims that it "has the statutory right to reject union authorization cards as proof of majority status and has the right to withhold recognition until the Union shall have been certified pursuant to an election conducted by the National Labor Relations Board." [48]

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[46] A showing of doubt requires more than an employer's mere assertion of it and more than the proof of the employer's subjective state of mind. Doubt must be proved by objective considerations. Cf. *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484. Objective facts in the instant case do not furnish a reasonable basis for any doubt.

[47] "* * * there must be some manifestation of doubt to the union." *Skyline Homes, Inc.* v. *N.L.R.B.*, 323 F. 2d 642, 648 (C.A. 5).

[48] In *N.L.R.B.* v. *Dahlstrom Metallic Door Co.*, *supra*, 757, the Court said, "The contention that bargaining was not mandatory until the Board had accredited Local No. 307 as bargaining agent is frivolous."

But "[t]here is no absolute right vested in an employer to demand an election." *N.L.R.B.* v. *Trimfit of California,* 211 F. 2d 206, 209 (C.A. 9); accord *N.L.R.B.* v. *Nelson Mfg. Co.,* 326 F. 2d 397, 399 (C.A. 6)."[49] "The Act is clear in intent * * * that election and certification proceedings are not the only method of determining majority representation * * *." *L.B. Hartz Stores,* 71 F. 2d 398, 405 (C.A. 9).

Moreover, the argument of the Respondent Company overlooks the salient and distinguishing fact that in the instant case not only was the majority status proved by valid union authorization cards but the majority status was positively proved by the strike and peaceful picketing by a majority of the employees in an appropriate unit. Such a showing of majority support constituted a designation of the Union as the bargaining representative of the Respondent Company's employees within the meaning of Section 9(a) of the Act and was as legally binding upon the Respondent as if the Board had certified the results of an election conducted in conformity with Section 9(c) of the Act.

The Supreme Court has said in *United Mine Workers of America* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 71 "* * * Section 9(a), which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *N.L.R.B.,* 76 U.S. App.

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[49] In *United Butchers Abattoir, Inc.,* 123 NLRB 957, the Board said, "The right of an employer to insist upon a Board-directed election is not absolute." Stated another way the Board recently said in *Metropolitan Life Insurance Company,* 156 NLRB 1408:

"A representative proceeding is not a prerequisite to the validity of a bargaining order."

D.C. 100, 103, 130 F. 2d 404, 407." [50] The statute "leaves open the manner of choosing" the bargaining representative. *Id.*, 74.

When a choice of bargaining agent has been made which satisfies the requirements of Section 9(a) of the Act an employer may not test the economic strength of his employees by provoking or prolonging a recognition strike. There is no doubt that the Respondent employer could have lawfully recognized and bargained with the Union. "That being so, there is no reason why the employees, and their union under their authorization, may not under Section 13, strike, and, under Section 7, peacefully picket the premises of their employer to induce it thus to recognize their chosen representative" *United Mine Workers of America* v. *Arkansas Oak Flooring Co., supra.* 75. The strike and peaceful picketing on October 12, 1965, were lawful [51] and the employees' choice of the Union by signed designations and the participation in strike and picket line activities satisfied the requirements of Section 9(a). Hence it must be conceded that the Union represented a majority of the Respondent Company's employees in an appropriate unit.

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[50] The following language appears on 407:

The Wagner Act requires no specific form of authority to bargain collectively . . . . Authority may be given by action as well as words * * *. Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as employees' representative in collective bargaining. This intent has been found from participating in a strike vote taken by the union, a strike called by the union, and acceptance of strike benefits. It is only necessary that it be manifested in some manner capable of proof, whether by behavior or language * * *.

[51] Where a meritorious 8(a)(5) charge is filed an 8(b)(7)(C) charge will not lie. See *International Hod Carriers Building and Common Laborers Union of America*, 135 NLRB 1153, 1166, fn. 24.

"Under [Section 7 and 9(a)] and by virtue of the conceded designations of the Union, the employer is obligated to recognize the designated union." *United Mine Workers of America* v. *Arkansas Oak Flooring Co., supra,* 75. Where, as here, the employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without a valid ground therefor, he has failed to fulfill the bargaining requirements under the Act. *Snow and Sons,* 134 NLRB 709, 710.

The Trial Examiner finds that by its refusal to recognize and bargain collectively with the Union on October 12, 1965, and thereafter the Respondent Company violated Section 8(a)(1) and (5) of the Act and that the strike which resulted therefrom was caused and prolonged by said unfair labor practices and the strike was an unfair labor practice strike.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UNON COMMERCE

The activities of the Respondent Company set forth in section III, above, occuring in connection with its operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The Board has said:

> The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred and thereby effectuate the policies of the Act. Thus, "depend[ing] upon the circumstances of each case," the Board must "take measures designed

> to recreate the conditions and relationships that would have been had there been no unfair labor practice." [*H. W. Elson Bottling Co.*, 155 NLRB 714, 715.]

"To recreate the conditions and relationships that would have been had there been no unfair labor practice" in the instant case would mean literally that the status quo must be restored as of a date immediately preceding the time when the Respondent Company first determined to deny recognition to the Union. At that time all strikers were gainfully employed. They were performing their usual job assignments. On that date had the Respondent Company assumed its obligation to bargain, it is reasonable to assume that the strikers would have remained at work and collective bargaining would have had a chance to succeed. However, by reason of the Respondent Company's unfair labor practices this chance for collective bargaining to succeed will occur *after* the Company by its unfair labor practices has reduced the Union's bargaining strength and dissipated the effect of its strike. Thus the recreation of the identical conditions and relationships as they existed had the unfair labor practices not been committed appears to be impossible of achievement, but there is left the probability of depriving the Respondent Company in part of the advantages it has unlawfully gained, one of which has been the reduction of the Union's bargaining power to almost nothing. By its unfair labor practices the Respondent deprived its employees of the means of dealing with their employer with a measure of equality, discouraged collective bargaining, and rendered impotent their utilization of collective action. In this the Respondent flouted the purposes of the Act. "* * * the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the

individual worker's inequality of bargaining power * * *." *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 126.

A bare order to bargain in this case will only serve to acknowledge the formalities of the law while the Respondent retains full possession of the fruits of its violations. Cf. *Montgomery Ward & Co.* v. *N.L.R.B.*, 339 F. 2d 889, 894 (C.A. 6). Moreover, it is the Respondent who should bear the brunt of the disentanglement of the consequences of its unfair labor practices, since it has caused the chain of events which resulted in the deprivation of rights flowing to the Union and its employees. An appropriate remedy contemplates that the employer shall not retain the fruits of his unfair labor practices. *Beacon Piece Dying & Finishing Co., Inc.*, 121 NLRB 953, 963. See also *N.L.R.B.* v. *Armco Draining & Metal Products, Inc.*, 220 F. 2d 573 (C.A. 6); *Piasecki Aircraft Corporation* v. *N.L.R.B.*, 280 F. 2d 575, 591 (C.A. 3), cert. denied 364 U.S. 933. A remedy which will "effectuate the policies" of the Act in this case calls for a restoration of the Union's bargaining power lost by reason of the Respondent Company's unfair labor practices.

Hence, in order that to some extent the bargaining power of the Union destroyed by the Respondent Company's labor practices may be restored, and, in order that the unfair labor practice strikers who lost pay by reason of the Respondent Company's unfair labor practices may be reimbursed, and, in order to effectuate the policies of the Act, the Trial Examiner recommends, in addition to a bargaining order and the posting of notices, that the Respondent make whole each unfair labor practice striker for loss of earn-

ings[52] he has suffered by paying to him a sum of money equivalent to the amount he would have normally earned during any periods commencing on October 12, 1965 when his usual job assignments were performed by another employee until such time as the Respondent Company has complied with the Recommended Order herein, less net earnings during said period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289, and shall include interest at the rate of 6 percent per annum, to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In that a purpose of the Remedy is "to remedy the individual worker's inequality of bargaining power" caused by the Responent Company's unfair labor practices, it is further recommended that the Union be allowed to utilize the recommended backpay award as an item for negotiation.

CONCLUSIONS OF LAW

1. The Textile Workers Union of America, AFL–CIO, is a labor organization within the meaning of the Act.

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[52] The Act does not specifically limit the Board's power to order backpay to any specific violation of the Act. Section 10(c) of the Act provides:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practices, then the Board . . . shall issue . . . on such person an order requiring such person . . . to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act."

As unfair labor practice strikers, the strikers in the instant case are entitled to reinstatement.

2. The Respondent Wilder Mfg. Co., Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. All production and maintenance employees of the Wilder Mfg. Co., Inc., employed at its Port Jervis, New York, plant, excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. At all times since October 12, 1965, the above labor organization has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain with the Union on and after October 12, 1965, said Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The strike which commenced on October 12, 1965, was caused and prolonged by said Respondent's unfair labor practices and hence was an unfair labor practice strike.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that the Respondent, Wilder Mfg. Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with the Textile Workers Union of America, AFL–CIO, in the following appropriate unit: All production and maintenance employees of the Wilder Mfg. Co., Inc., employed at its Port Jervis, New York, plant, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, reduce it to writing and sign it.

(b) Make whole each unfair labor practice striker for any loss of pay he may have suffered by reason of the said Respondent's unfair labor practices in accordance with the recommendations set forth in "The Remedy" herein.

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of backpay due and related rights provided under the terms of this Recommended Order.

(d) Post at its Port Jervis, New York establishment, copies of the notice attached hereto and marked "Appendix."[53] Copies of said no-

[53] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's

tice, to be furnished by the Regional Director for Region 2, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Recommended Order, what steps said Respondent has taken to comply herewith.[54]

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in this Decision.

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the Textile Workers Union of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

Order is enforced by a decree of a United States Court of Appeals, the words "a decree of the United States Court of Appeals enforcing an order" shall be substituted for the words "a Decision and Order."

[54] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is: All production and maintenance employees of the Wilder Mfg. Co., Inc. employed at its Port Jervis, New York plant, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL make whole each unfair labor practice striker for any loss of pay he may have suffered by reason of our unfair labor practices.

WILDER MFG. CO., INC.,
(Employer).
By
_____ _____
(Representative) (Title).

Dated:

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Fifth Floor Squibb Building, 745 Fifth Avenue, New York, New York 10022, Telephone 751–5500.

APPENDIX E

United States Court of Appeals District of Columbia Circuit

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 22596

Argued Oct. 24, 1969.

Decided Nov. 14, 1969.

Before FAHY, Senior Circuit Judge, and McGOWAN and MACKINNON, Circuit Judges.

PER CURIAM:

In this proceeding brought by a union to review an order of the National Labor Relations Board dismissing a Section 8(a)(5) complaint, counsel for both the petitioner and the Board filed supplemental briefs after the Supreme Court decided NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). This was because the case, involving as it does the refusal of the employer to recognize the union on the basis of authorization cards, fell within the general ambit of *Gissel*. Counsel for the Board now argues that, although here, unlike *Gissel*, the employer engaged in no independent unfair labor practices, there are expressions by the Court in *Gissel* which indicate approval of the course followed by the Board. The union, contrarily, stresses the differing circumstances of *Gissel*, and urges us to approve a method of handling pressed upon the Su-

preme Court in *Gissel* but not dealt with definitively by it.[1]

We think the matter of sufficient importance to warrant further consideration by the Board in the first instance in the light of *Gissel,* but without limitation; and we remand the case for that purpose. In doing so, we note particularly that the defense advanced by the employer at the unfair labor practice hearing was that it did not think the cards presented to it represented a majority of the appropriate unit, as the employer conceived that unit to be. In *Gissel,* the Supreme Court at p. 594, 89 S. Ct. (at p. 1930) said the Board had represented at oral argument that the Board's

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[1] In declining to consider the particular argument urged by the union in *Gissel*, the Court characterized that argument as follows:

"The union argues here that an employer's right to insist on an election in the absence of unfair labor practices should be more circumscribed, and a union's right to rely on cards correspondingly more expanded, than the Board would have us rule. The union's contention is that an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself immediately under § 9(c) (1) (B) and not by insisting that the union file the election petition, whereby the election can be subjected to considerable delay. If the employer does not himself petition for an election, the union argues, he must recognize the union regardless of his good or bad faith and regardless of his other unfair labor practices, and should be ordered to bargain if the cards were in fact validly obtained. And if this Court should continue to utilize the good faith doubt rule, the union contends that at the least we should put the burden on the employer to make an affirmative showing of his reasons for entertaining such doubt. 395 U.S. at 594, 89 S.Ct. at 1930."

At oral argument before this court, the union also argues that the employer should show evidence of doubt based upon an objective standard of reasonableness, rather than the subjective standard of good faith.

"current practice" was to view "an employer's good faith doubt [as] largely irrelevant," although "an employer could not refuse recognition initially because of questions as to the appropriateness of the unit * * *."[2] In view of this representation, there would appear to be some question as to whether the employer's conduct here allowed it, under the Board's "current practice," to escape a violation by remaining passive. Thus it would appear useful for the Board to look at this case again not only in the light of what the Court decided in *Gissel* but also by reference to what the Court said it understood the Board's practice to be in situations not involving independent unfair labor practices but where the employer stands upon a doubt as to the appropriateness of the unit.

An order of remand will issue.

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[2] The passage in its entirety is as follows:

Although the Board's brief before this Court generally followed the approach as set out in *Aaron Brothers*, 158 N.L.R.B. 1077 *supra*, the Board announced at oral argument that it had virtually abandoned the Joy Silk Mills, Inc. v. N.L.R.B., 87 U.S. App.D.C. 360, 185 F.2d 732 doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no comment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

FAHY, Senior Circuit Judge (concurring):

I concur in the remand for further consideration by the Board of its own current practice as understood by the Supreme Court in NLRB v. Gissel Packing Co., 390 U.S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547 (1969), but without limitation. I point out, however, what seems to me the narrow scope of the *Gissel* decision in relation to this case. The Supreme Court ruled that an employer's duty to bargain under Section 8(a) (5) is not restricted solely to those unions which have been certified after a Board election. The Court also rejected the view that Union authorization cards are inherently unreliable. The facts in the record before us make both of these rulings applicable to the present case, but the Supreme Court also pointed out that it was not deciding whether a refusal to bargain absent an unfair labor practice other than a violation of Section 8(a) (5) constitutes a violation of that section.* I accordingly do not give weight to the Board's present contention that because the Court described current practices of the Board it impliedly approved them. On the other hand I do not think the Court's decision covers the Union's position in the present case, aside from the specific holdings noted above.

Our Per Curiam suggests that the Supreme Court's understanding of current Board practice is that it

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*In footnote 18, *Gissel* at 601, 89 S. Ct. at 1933, the Court warned that,

"In dealing with the reliability of cards, we should re-emphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices * * * *."

prohibits an employer from refusing to grant union recognition on the ground that there is no appropriate unit, thus raising the question whether under that practice the employer's conduct in our case would be proper. That the Board's current practice is as our Per Curiam suggests the Supreme Court understood it to be is not entirely clear to me.

Putting aside now the reference in the Supreme Court's opinion to the practice of the Board as stated in its oral argument in *Gissel,* it is significant that the standard the Board urges in support of its decision favorable to the employer in the present case is one of "bad faith" on the employer's part. In this connection the Board urges that if the employer does not commit other unfair labor practices it can refuse to bargain with impunity so long as it has no independent knowledge of the Union's representative status. The present record reveals that the Union representatives had authorization cards free of suspicion from a majority in a unit recognized as appropriate by the trial examiner and the Board, followed by evidence of the majority's solidarity through the picketing and strike. Moreover, the employer did not demand that the Union request a Board election. It simply refused to recognize the Union. I understand our remand does not exclude consideration anew of whether in these circumstances the employer was shown to have acted in bad faith and, if so, the appropriate disposition the Board should make of the case.

MacKinnon, Circuit Judge:

I concur in the remand but am of the opinion that *Gissel* supports the Board's position.

APPENDIX F

Arthur F. Derse, Cr., President, and Wilder Mfg. Co., Inc. *and* Textile Workers Union of America, AFL–CIO. Case 2–CA–10823—August 27, 1970

Supplemental Decision and Order

BY CHAIRMAN MILLER AND MEMBERS FANNING, MC CULLOCH, AND BROWN

On October 21, 1968, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, finding that Respondent had not engaged in and was not engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and ordered that the complaint be dismissed.[1]

On November 14, 1969, the Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further consideration "in the first instance in the light of *Gissel,* but without limitation. * * *"[2]

Thereafter, on February 27, 1969, counsel for the Union requested leave to file a supplemental brief, and the Board granted all parties leave to file supplemental briefs. The Union timely filed its brief on April 10, 1970.

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[1] 173 NLRB 30.

[2] *Sub nom. Textile Workers Union of America* v. *N.L.R.B.*, 420 F. 2d 635. The court's reference to *Gissel* is to the Supreme Court's opinion in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 1969.

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Pursuant to the remand, the Board has again reviewed the entire record in this case and, having duly reconsidered the matter, has concluded for the reasons set forth below that Respondent's course of conduct herein constituted a violation of Section 8(a)(5) and (1) of the Act. Accordingly, we hereby reinstate the complaint in this proceeding, and affirm our previous decision and Order only to the extent consistent herewith.

As found by the Board in its previous Decision, on the morning of October 12, 1965, representatives of the Union presented Walter Derse, secretary and general manager of Respondent Company, with 11 signed and 2 unsigned union membership cards, and requested recognition as bargaining agent of the Company's production and maintenance employees. There were then 30 employees on the Company's payroll, 18 of whom were found to be in the production and maintenance unit for which the Union claimed representation rights, and which the Board found to be appropriate for purposes of collective bargaining. Derse, after examining the cards, disclaimed authority to grant the request, but promised to give the Union an answer the following day. The union representatives insisted, however, on an immediate answer. Failing to receive it, the employees who had signed the authorization cards left the plant and established a picket line. They were joined the next day by two other employees who had signed the 2 blank cards which were among the 13 presented to Derse.

During the evening of the next day, October 13, the Company's officers met. Upon Walter Derse's report that there were 10 or 11 employees on the picket line and as "we are about 30 (not including the officers of the Company) it appears that they do not represent a majority," the officers decided not to recognize the

Union. They then decided to retain labor counsel. On October 25, a union representative encountered Derse in the parking lot, and asked him if he had made a decision. (Derse had not informed the Union of the decision reached at the October 13 meeting.) Derse replied that he had no comment to make and handed him a slip with the name of a law firm on it. The union representative contacted the named law firm and was told that the firm had received no instructions from its client. The Union subsequently renewed its bargaining requests but at no time was it ever informed of Respondent Company's decision not to recognize or bargain with it or the reasons therefor.

The Board, reversing its Trial Examiner in its original Decision, ruled that Respondent did not violate Section 8(a)(5) by its refusal to recognize the Union.

The court of appeals, noting that the opposing arguments of both Board and union counsel, though based on language from the *Gissel* decision, raised issues not definitively dealt with by the Supreme Court,[3] remanded the case for reconsideration. The purposes of the remand are succinctly summarized in the following sentence appearing at the conclusion of the court's opinion:

> Thus it would appear useful for the Board to look at this case again not only in the light of what the Court decided in *Gissel* but also by reference to what the Court said it understood the Board's practice to be in situations not involving independent unfair labor practices but

[3] In *Gissel*, the Supreme Court noted that because the cases before it each involved independent unfair labor practices, it did not need to decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes. *Supra*, 595, see also p. 601, fn. 18.

> where the employer stands upon a doubt as to the appropriateness of the unit.

The reference to the Supreme Court's opinion in *Gissel* is to that portion of the Supreme Court opinion in which it was said:

> The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

As to the narrow question of a possible violation of Section 8(a)(5) when an employer refuses to bargain and "stands upon his doubt as to the appropriateness of the unit," we do not believe the facts of this case put this question squarely in issue. The Respondents' response—or lack of response—to the Union demand did not assert this as the ground of the refusal, so that the record here does not, we have concluded upon review, pose this question.[4]

We are left, however, with another issue suggested by the court's reference to the *Gissel* opinion, and have found it necessary to pursue upon this remand the

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[4] The Respondents did later contend before this Board that certain additional employees should be added to the Union's proposed unit. We have, however, in other cases been required to resolve such unit questions in 8(a)(5) cases and, upon making a finding of appropriate unit, then proceeded to direct the respondent to bargain in the unit ultimately found appropriate. *United Aircraft Corp.*, 144 NLRB 492, enfd. 333 F. 2d 819 (C.A. 2.). Generally, of course, any such doubts are best resolved in the course of representation case procedures which any party is free to invoke. As we note *infra*, the Respondents here made no attempt to resolve any doubts as to appropriateness of unit by this method.

further question of whether, recognizing that there are no independent unfair labor practices involved, the facts here require a conclusion that the Employer *knew* that a majority of his employees supported the Union and nevertheless refused to bargain. A finding of such knowledge would, of course, have to be predicated upon more than the mere presentation of authorization cards in a number sufficient to indicate a majority inasmuch as the Supreme Court has given tacit approval to the principle that an employer may reject a card showing and insist upon an election. We do not believe, however, that it has yet been made clear whether a 8(a)(5) violation will be found if the record contains (1) evidence in addition to mere cards sufficient to communicate to the employer convincing knowledge of majority status, and (2) insufficient evidence that the employer's refusal to grant recognition was based on a genuine willingness to resolve any doubts concerning majority status through the Board's election processes.

In the instant case, the record demonstrates not only that 11 out of the 18 production and maintenance employees had signed authorization cards, but also that all of the card signers dramatically evidenced their support for the Union by actively participating in a picket line and in a strike, and, furthermore, that an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union "had 10 or 11" of the employees.

Upon this record we are compelled to find that the Employer did have knowledge that a majority of his employees supported the Union. We also do not find any facts in the record which evidence a genuine willingness, on the part of the Respondent, to resolve any lingering doubts which might have remained as to majority status by resort to the Board's

election procedures. The Employer did not itself file an election petition or urge or even suggest to the employees or the Union the use of such procedures, nor did it at any time indicate a *willingness* to participate in a representation proceeding, wherein any unit question, as well as any issue of majority status could have been resolved in an orderly manner. In the interest of encouraging all parties to avail themselves of our election procedures, we would not be inclined to enter a bargaining order if, absent independent unfair labor practices, the record supported a finding that the Respondent had in good faith indicated a willingness to utilize those procedures, since, as the Supreme Court has said, a Board-conducted election is indeed the "preferred route" for determining employee desires.

On this record, however, where there is substantial evidence to demonstrate employer's knowledge of majority status and no evidence demonstrating a willingness or desire on the part of the Employer to resolve any doubt which it may have entertained through the election process, we must conclude that the refusal to bargain constituted a violation of Section 8(a)(5) of the Act and that a bargaining order is, here, an appropriate remedy.

Finally, we reject Respondent's contention that our finding that it violated Section 8(a)(5) by refusing to recognize and bargain with the Union in the circumstances of this case "will completely abrogate the provisions of Section 8(b)(7)(C) of the Act," and that those provisions support its position that it has an absolute right to an election before being compelled to bargain with the Union.

Section 8(b)(7) places restrictions on recognitional and organizational picketing by noncertified unions. Under Section 8(b)(7)(C), picketing for recognition is unlawful if "conducted without a petition under

Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." Thus, a timely filed petition operates as a defense to a charge and complaint that union's recognitional picketing violates 8(b)(7)(C). A proviso to the section directs the Board to conduct an expedited election whenever a timely petition is filed by the employer or the union.[5]

In *Blinne Construction Company*,[6] the Board held that the restrictions placed on recognitional picketing by 8(b)(7)(C) were applicable to majority unions; i.e., that the fact of majority status does not excuse a union from the necessity of timely filing a petition—pursuant to which the underlying question concerning representation could be resolved—as a defense to a charge that its recognitional picketing violated Section 8(b)(7)(C). It is this holding that Respondent contends precludes a finding that its refusal to recognize the Union violates Section 8(a)(5) where an election has not been held.

We reject the contention for the following reasons. Our decision in *Blinne* expressly rejects such a construction of the statute where a union strikes and pickets against an employer's unlawful refusal to recognize it and *meritorious* 8(a)(5) charges have been filed.[7] The provisions of Section 8(a)(5) have since been applied by the Board in a manner consistent with such construction of 8(b)(7).[8] At the time Re-

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[5] To invoke this procedure, an 8(b)(7)(C) charge must be filed. Board's Rules and Regulations, Sec. 102.76.

[6] *International Hod Carriers' Building and Common Laborers' Union of America, Local 840, AFL–CIO (Charles A. Blinne d/b/a Blinne Construction Company)*. 1353 RB 1153.

[7] Id. at p. 1166, fn. 24.

[8] See, e.g., *Comfort, Inc*, 152 NLRB 1074, enfd. in pertinent part 365 F. 2d 867 (C.A. 8); *World Carpets of New York, Inc.*, 163 NLRB No. 74.

spondent made its decision to refuse to recognize the Union, it was confronted by convincing evidence of the Union's majority status,[9] and as we have shown before, it never demonstrated a willingness to invoke the election processes; nor did it file a charge that the Union's strike and accompanying picketing constituted violations of Section 8(b)(7)(C).

We find, accordingly, that, by refusing on and after October 12, 1965, to recognize and bargain collectively with the Union Respondent violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this latter respect, we shall order Respondent, upon request of the Union, to recognize and bargain collectively with the Union as the representative of employees in the bargaining unit found appropriate herein. We shall also order Respondent to offer reinstatement to each striker upon his application and reimburse these employees for any loss of earnings suffered by Respondent's refusal, if any, to so reinstate them. In this connection, we reject the Trial Examiner's recommendation that Respondent be ordered to make whole each unfair labor practice striker for loss of earnings he has suffered during the period from the commencement of the strike until such date as he applies for reinstatement. In our judgment, there are no unusual circumstances present justifying a departure from the existing Board precedent that employees are not entitled to backpay while on strike.[10]

[9] See *Gissel*, *supra*, 597–598.

[10] *Baldwin County Electric Membership Corporation*, 145 NLRB 1316; *Sea-Way Distributing, Inc.*, 143 NLRB 460.

CONCLUSIONS OF LAW

1. The Textile Workers Union of America, AFL–CIO, is a labor organization within the meaning of the Act.

2. The Respondent, Wilder Mfg. Co., Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. All production and maintenance employees of the Wilder Mfg. Co., Inc., employed at its Port Jervis, New York, plant, excluding all other empolyees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. At all times since October 12, 1965, the above labor organization has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain with the Union on and after October 12, 1965, said Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The strike which commenced on October 12, 1965, was prolonged by said Respondent's unfair labor practices and hence was an unfair labor practice strike.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that Respondent Wilder Mfg. Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with the Textile Workers Union of America, AFL–CIO, in the following appropriate unit:

> All production and maintenance employees of the Wilder Mfg. Co., Inc., employed at its Port Jervis, New York, plant, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, reduce it to writing and sign it.

(b) Upon application, offer immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions to all its employees who went on strike on October 12, 1965, or thereafter, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, all persons hired on or after that day, and make such applicants whole for any loss of pay suffered by reason of the Respondent's refusal, if any, to reinstate them by payment to each of them of a sum of money equal to that which he normally would have earned, less the net earnings, during the period from 5 days after the date on which he applied or has applied for reinstatement to the date of the Respond-

ent's offer of reinstatement, with backpay to be computed as set forth in *F. W. Woolworth Company,* 90 NLRB 289, and with interest at the rate of 6 percent per annum to be added to the backpay due, as set forth in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

(c) Notify any employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of backpay due and related rights provided under the terms of this Recommended Order.

(e) Post at its Port Jervis, New York, establishment, copies of the attached notice marked "appendix."[11] Copies of said notice, to be furnished by the Regional Director for Region 2, shall, after being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgement of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director for Region 2, in writing, within 10 days from the date of this Order, what steps said Respondent has taken to comply herewith.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD—AN AGENCY OF THE UNITED STATES GOVERNMENT

We hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with the Textile Workers Union of America, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of the Wilder Mfg. Co., Inc., employed at its Port Jervis, New York, plant, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL, upon application, offer immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions to all our employees who went on strike on October 12, 1965, or thereafter, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, all persons hired on or after that

day, and make such applicants whole for any loss of pay suffered by reason of our refusal, if any, to reinstate them by payment to each of them of a sum of money equal to that which he normally would have earned, less the net earnings, during the period from 5 days after the date on which he applied or has applied for reinstatement.

WE WILL notify any employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WILDER MFG. CO., INC,
(Employer).

Dated By ——— ———,
(Representative) (Title).

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212–264–0300.

APPENDIX G

United States of America Before the National Labor Relations Board

CASE 2–CA–10823

ARTHUR L. DERSE, SR., PRESIDENT, AND
WILDER MFG. CO., INC.

AND

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO

SECOND SUPPLEMENTAL DECISION AND ORDER

On October 21, 1968, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding finding that Respondent had not engaged in and was not engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, and ordering that the complaint be dismissed.[1]

On November 14, 1969, the Court of Appeals for the District of Columbia remanded the case to the Board for further consideration "in the first instance in the light of *Gissel,* but without limitation. * * *"[2]

On August 27, 1970, the National Labor Relations Board issued its Supplemental Decision and Order in the above-entitled proceeding finding that Respondent had engaged in and was engaging in unfair labor

[1] 173 NLRB 214.

[2] *Sub nom. Textile Workers Union of America* v. *N.L.R.B.*, 420 F.2d 635. The court's reference to *Gissel* is to the Supreme Court's opinion in *N.L.R.B.* v. *Gissel Packing Company, Inc.*, 395 U.S. 575 (1969).

practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.[3]

On June 7, 1971, the Board issued its Decision in *Linden Lumber Division, Summer & Co.*, 190 NLRB No. 116. Thereafter, in order to insure consistency in its decisions, the National Labor Relations Board moved the United States Court of Appeals, District of Columbia Circuit, to have the instant case remanded to it for reconsideration in light of its decision in *Linden Lumber*. On November 1, 1971, the United States Court of Appeals, District of Columbia, determined that it was not the proper forum for considering this case in light of the provisions of Section 10(e) of the Act and transferred the proceedings to the United States Court of Appeals for the Second Circuit.[4] On February 1, 1972, the United States Court of Appeals for the Second Circuit granted the Board's motion to remand to the National Labor Relations Board for reconsideration.

The Board has invited statements of position from the parties. A statement of position has been received from Respondent. The Board has duly reconsidered the matter and has concluded[5] for the reasons set forth below that Respondent has not engaged in and was not engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

In the Supplemental Decision in the instant case the Board found that, even in the absence of independent unfair practices, an employer is obligated

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[3] 185 NLRB No. 76.

[4] *N.L.R.B.* v. *Wilder Mfg. Co.*, F. 2d.

[5] Respondent's request for oral argument is hereby denied, as the record, including Respondent's brief upon remand for further consideration, adequately presents the issues and the positions of the parties.

to bargain with a union where, as here, there is substantial evidence to demonstrate an employer's knowledge of majority status and no evidence demonstrating a willingness or desire on the part of the employer to resolve any doubt which it may have entertained through the election process. In *Linden Lumber, supra*, the Board stated:

> The facts of the present case have caused us to reassess the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition. Unless, as in *Snow & Sons* [134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9)], the employer has agreed to let its "knowledge" of majority status be established through a means other than a Board election, how are we to evaluate whether it "knows" or whether it "doubts" majority status? And if we are to let our decisions turn on an employer's "willingness" to have majority status determined by an election, how are we to judge "willingness" if the record is silent, as in *Wilder*, or doubtful, as here, as to just how "willing" the Respondent is in fact? We decline, in summary, to reenter the "good-faith" thicket of *Joy Silk* [*Mills, Inc.*, 85 NLRB 1263, enfd. as modified 185 F. 2d 732 (C.A.D.C.)], which we announced to the Supreme Court in [*N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)] we had "virtually abandoned . . . altogether," *id.*, 594.
>
> These considerations led us to the conclusion that Respondent should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election. We repeat for emphasis our reliance here upon the additional fact that the Respondent and the Union never voluntarily agreed upon any mutually acceptable and legally per-

> missible means, other than a Board-conducted election, for resolving the issue of union majority status. By such reliance we recognize and encourage the principle of voluntarism but at the same time insure that when voluntarism fails the "preferred route" of secret ballot elections is available to those who do not find any alternative route acceptable. [Footnote omitted.]

The effect of the decision in *Linden* was to overrule the views expressed in our Supplemental Decision in the instant case and to find that a bargaining obligation under Section 8(a)(5) may not be established solely on the basis of facts which might give rise to an inference that an employer had knowledge of majority status. As in *Linden, supra,* the record here is devoid of evidence that the employer either attempted, as in *Nation-wide Plastics,* 197 NLRB No. 136, or agreed, as in *Snow & Sons,* 134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9), to determine majority status by any means other than a Board election. Thus, in the absence of any independent unfair labor practices, we conclude that Respondent did not violate Section 8(a)(5) and (1) and that the complaint should be dismissed.

Our dissenting colleague, in disagreeing with our dismissal of the complaint herein, errs in his reliance on the Supreme Court decsion in *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 576. His lengthy quotations from the opinion in that case were taken from the Court's rationale supporting its holding that this Board may rely on authorization cards to support a bargaining order where the employer's unfair labor practices have been serious enough to make a fair election impossible. In footnote 18 of the *Gissel* opinion, however, the Court clearly outlined the issues it was *not* deciding. The following excerpts from that

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footnote make it clear that the issue posed here was not before the Court in that case:

> In dealing with the reliability of cards, we should reemphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election. * * * In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside.

Repeating what we said in *Linden Lumber*, we remain of the view that, *absent employer unfair labor practices*, the objectives of our statute are best served by encouraging the parties to utilize our orderly election procedures to establish a reliable majority-support foundation for a bargaining relationship. In such cases, it seems far better not to enter the tangled thicket of frequently unreliable evidence as to the subjective desires of employees with respect to representation. As the Court said in *Gissel*, we have long recognized that the election process is the "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."

We do not ignore what the Court also recognized: that authorization cards—or other types of evidence, for that matter—are not "thereby rendered totally invalid." And where, as in *Gissel*, we are forced to

rely on such other evidence because the employer's violations of our Act have foreclosed the effective utilization of fair election procedures, we shall do so, despite our knowledge that such means are less reliable indicators of employee choice.

We are also fully aware that many bargaining relationships begin on the basis of some other voluntarily agreed-upon method of determining majority status, and we place no impediment in the way of such voluntarism. But we are dealing here with a phenomenon which continues to occur with some frequency in our society—a union determined upon an organizational effort and an impatient work force, eager to secure immediate bargaining, encountering an employer who is not willing voluntarily to enter into a collective-bargaining relationship. The seemingly irresistible force has encountered the seemingly immovable object.

Is it wise, in such cases, to encourage conflict, strikes, and contested litigation before this Board as a means of establishing a shaky foundation for future bargaining?

We think not.

We think it far better, by making clear here, as we did in *Linden,* that the proper course in such cases is for the union, on behalf of the employees, to invoke our election processes. In that manner, if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks. Surely that is a far better basis for the bargaining relationship than a decision in litigation which would take us nearly a year to reach and which, even then, may be subject to debate as to the soundness of its evidentiary base and to further contest in the courts.

It is for these reasons that both here and in *Linden* we have answered the questions left open by the Supreme Court in *Gissel* and refused to enter a bargaining order on the basis of cards or other circumstantial evidence of majority status, where there has been no voluntary agreement on a means of resolving majority status and when the road to a free and fair election has not been impeded by unlawful employer conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C.

[SEAL] NATIONAL LABOR RELATIONS BOARD,
EDWARD B. MILLER, *Chairman.*
HOWARD JENKINS, JR., *Member.*
RALPH E. KENNEDY, *Member.*
JOHN A. PENELLO, *Member.*

Member JOHN H. FANNING, dissenting:

I dissent from my colleagues' dismissal of the complaint in this case. In our Supplemental Decision in this case,[*] the Board found:

> In the instant case, the record demonstrates not only that 11 out of the 18 production and maintenance employees had signed authorization cards, but also that all of the card signers dramatically evidenced their support for the

[*] 185 NLRB No. 76.

> Union by actively participating in a picket line and in a strike, and, furthermore, that an officer of the Respondent conceded in his testimony that he told his fellow officers that the Union "had 10 or 11" of the employees.
>
> Upon this record we are compelled to find that the Employer did have knowledge that a majority of his employees supported the Union. We also do not find any facts in the record which evidence a genuine willingness on the part of the Respondent to resolve any lingering doubts which might have remained as to majority status by resort to the Board's election procedures.

My colleagues do not reverse the finding of employer-knowledge of majority status. Indeed they cannot for the record speaks plainly and irrefutably of such knowledge.

In view of that finding, the question presented in this case resolves into the simple one of whether, in the absence of a bona fide dispute as to majority status, Respondent violated Section 8(a)(5) when it refused to bargain with representative designated by its employees.

That question has been answered in the affirmative time and time again [7]—most recently by this Board in

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[7] See, for example, *Redmond Plastics, Inc.*, 176 NLRB 98; *Stecher-Traung-Schmitt Corporation, Wheeler-Van Label*, 172 NLRB No. 186; *Sands Motor Hotel*, 162 NLRB 863; *H & W Construction Company*, 161 NLRB 852; *Fleming & Sons of Colorado, Inc.*, 147 NLRB 1271; *Greyhound Terminal*, 137 NLRB 87. See also *Brown Truck and Trailer Manufacturing Company, Inc.*, 106 NLRB 999, 1001 and cases cited.

the *Pacific Abrasive* decision[8] and by the Supreme Court in the *Gissel* decision.[9]

In *Gissel,* the Court had before it the question of whether the bargaining obligation could be imposed on an unwilling employer where the only evidence of majority status was authorization cards.

> The first issue facing us [the Court stated] is whether a union can establish a bargaining obligation by means other than a Board election and whether the validity of alternate routes to majority status, such as cards, was affected by the 1947 Taft-Hartley amendments. [395 U.S. at 595–596]

Noting that these "1947 amendments weaken rather than strengthen" the argument that an election is the only route, the Court held as follows:

> A union is not limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8(a)(5) . . . that "[i]t shall be an

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[8] *Pacific Abrasive Supply Co., a subsidiary of the Carborundum Company,* 182 NLRB 329. Our Supplemental Decision in the instant case added to the finding of knowledge of majority status the gloss of a finding that the Respondent was unwilling to go to a Board election as a basis for imposing a bargaining order. Subsequently, in *Linden Lumber Division, Summer & Co.,* 190 NLRB No. 116, a majority of the Board refused to impose a bargaining obligation in circumstances not materially different from those involved in *Wilder* because the majority found the "willingness to go to an election" test an unsatisfactory and difficult standard to apply. I dissented from the refusal to find the 8(a)(5) violation for reasons substantially the same as those I rely on here. The majority has now explicitly overruled the supplemental *Wilder* decision. Significantly, however, the majority does not overrule *Pacific Abrasive,* nor can it do so without indicating disagreement with the Supreme Court, as this opinion demonstrates.

[9] *N.L.R.B.* v. *Gissel Packing Co., Inc.,* 395 U.S. 575, 595–600. *N.L.R.B.* v. *Dahlstrom Metallic Door Co.,* 112 F. 2d 756, 757 (C.A. 2d Cir. 1940).

unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Since § 9(a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of a majority support." [9] Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote,[10] or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11]

We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. [Citations omitted.] Thus, in *United Mine Workers, supra,* we noted that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status," 351 U.S., at 72 n. 8, since § 9 (a), "which deals expressly with employee representation says nothing as to how the employ-

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[10] See, *e.g.*, *Denver Auto Dealers Assn.*, 10 NLRB 1173 (1939); *Century Mills, Inc.*, 5 NLRB 807 (1938).

[11] The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the administration of the Act, see *N.L.R.B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2d Cir. 1938), cert. denied, 304 U.S. 576 (1938).

> ees' representative shall be chosen," 351 U.S., at 71. We therefore pointed out in that case where the union had obtained signed authorization cards from a majority of the employees, that "[i]n the absence of any bona fide dispute [12] as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act." 351 U.S., at 69. We see no reason to reject this approach to bargaining obligations now, and we find unpersuasive the Fourth Circuit's view that the 1947 Taft-Hartley amendments, enacted some nine years before our decision in *United Mine Workers, supra,* require us to disregard that case. Indeed, the 1947 amendments weaken rather than strengthen the position taken by the employers here and the Fourth Circuit below. [395 U.S. 596–598]

I have quoted at length from this aspect of the Court's *Gissel* decision because it leaves no room for the majority's conclusion that a bargaining obligation under Section 8(a)(5) may not be established solely on the basis of an employer's refusal to accept evidence of majority status other than the results of a Board election unless the employer had either attempted, as in *Nation-wide Plastics,* 197 NLRB No. 136, or agreed, as in *Snow & Sons,* 134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9), to determine majority status by any means other than a Board election. The Court did not say that an employer has the right to an election unless he agrees with the union to forego such an election or himself solicits evidence of employee desires by means of interrogation of or polling of employees. On the contrary the Court stated that an employer violates Section 8(a)(5) whenever it refuses to bargain with a union which has presented

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[12] See n. 11, supra.

it with "convincing evidence of majority support" such as "for instance by a union-called strike or strike vote," or even "by possession of cards signed by a majority of his employees authorizing the union to represent them for collective bargaining purposes." In the instant case, not only has the Employer examined the authorization cards presented to it by the Union, not only has a majority support for the Union been demonstrated by a strike supported by a substantial majority of the employees in the unit, including all the employees whose authorization cards the Respondent had examined, but the Respondent ackowledges that it knew that 10 or 11 employees in the 18-man bargaining unit supported the Union's bargaining demand.[13]

From the foregoing, it can be seen that the issue is not whether *Linden Lumber* overruled the Supplemental Decison and Order in this case. For even if *Linden* overruled the "willingness to go to an election" test of the supplemental *Wilder* decision, that test was a mere administrative gloss imposed on the principles of law discussed by the Court in the quoted portions of the *Gissel* decision. When that gloss is stripped away, there remains the principle of law that "in the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union . . . violate[s] § 8(a)(5) of the Act." "We see," the Court said, "no reason to reject this approach to the bargaining obligation now," and the majority has advanced no reason of policy or practicality to justify asking its attorneys to go into court to argue that the principle can now be ignored. Although there may be

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[13] In point of fact 13 employees in the unit went on strike and were observed on the picket line.

aspects of the Court's *Gissel* decision that permit of differing interpretations as to the method best calculated to carry out its intent, I see no warrant for ignoring its holding on the issue before us.

By the use of inexact paraphrase,[14] the majority opinion seeks to make it appear that the Supreme Court, in discussing the unreliability of authorization cards, was also imputing unreliability to strike votes, strikes, and affirmative employee responses to employer interrogation as to their support of the union as evidence of majority support. Plainly, that was not the case. The Court commenced its discussion of the unreliability of cards with these words: "We next consider the question whether authorization cards are such inherently unreliable indicators of employee desires that *whatever the validity of other alternate routes to representative status, the cards themselves* may never be used to determine a union's majority and to support an order to bargain." (Emphasis supplied.) (395 U.S. at 601) Having previously determined that presentation to the employer of "convincing evidence of majority support" imposes the bargaining obligation, and having cited "a union-called strike or strike vote" as just such convincing evidence, the Court's later discussion of the claimed unreliability of authorization cards as indicators of majority support simply cannot be read as imputing unreliabil-

[14] The majority opinion states: We do not ignore what the Court also recognized: that authorization cards—*or other types of evidence for that matter*—are not "thereby rendered totally invalid." And where, as in *Gissel*, we are forced to rely on *such other evidence* because the employer's violations of our Act have foreclosed the effective utilization of fair election procedures, we shall do so, despite our knowledge that such means are less reliable indicators of employee choice. [Emphasis supplied.] The emphasized language is not to be found in the portion of the *Gissel* decision referred to.

ity to such alternative methods of demonstrating majority support.

Putting these arguments aside, there are nevertheless compelling reasons for rejecting the majority's overruling of the supplemental *Wilder* decision. In that case the Board held that:

> . . . where there is substantial evidence to demonstrate Employer knowledge of majority status and no evidence demonstrating a willingness or desire on the part of the Employer to resolve any doubt which it may have entertained through the election process, we must conclude that the refusal to bargain constituted a violation of Section 8(a)(5) of the Act and that a bargaining order is, here, an appropriate remedy.

That rule certainly placed no unreasonable burden on the "unwilling employer." It permitted the employer to refuse to recognize a union and require the union to obtain a certification. But by requiring some movement by the employer towards invocation of the election procedures, it tended to insure realization of the aim professed by the majority in this case that "if there is indeed majority support, it will be evidenced in clear and unmistakable fashion within a matter of a few weeks." For our experience in conducting elections demonstrates that where employers are willing to go to an election, the election is held more expeditiously and with far less likelihood of interference in the conduct of the election than is the case where either party has to be forced to an election.

Internal staff studies of our elections disclose that objections are filed in only 6.5 percent of consent elections and 11.5 percent of stipulated elections, whereas the rate of objections to elections held pursuant to the directions of a Regional Director or the Board is over

20 percent.[15] When the parties are in agreement that an election shall be held, the rate of objections is only half that of those cases where the employer must be forced to an election after hearing.

But the holding in *Linden Lumber* and in this case permits employers who are unwilling to engage in collective bargaining to oppose and obstruct the election process, to take advantage of the procedures for purposes of delay, and, when finally forced to an election, to buy more time in the hopes of weakening the union's strength by engaging in unfair labor practices. Although the price for such conduct may be the eventual imposition of a bargaining order, they need not feel that even that is certain for there is a real likelihood that the remedy will be another election.[16] Should that election result in a union victory, they may still refuse to bargain to test the certification in an unfair labor practice proceeding. In either event, the bargaining obligation will be imposed on them after long months, even years, of delay when the union's strength has been dissipated by attrition and discouragement. Admittedly, not all employers seek to utilize the election procedures for purposes of obstruction and delay. Indeed, almost 80 percent of our elections are conducted pursuant to consent agreements and stipulations. But our rules must be tailored to the "unwilling employers" as well as to the cooperative employer and the rule applied in this case permits employers, such as the respondent in *Linden Lumber,* not only to commit unfair labor prac-

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[15] The figure for consent elections and stipulated elections combined is about 10 percent. Such elections outnumber elections by about 4 to 1.

[16] See, for example, *Restaurant Associates Industries, Inc.*, 194 NLRB No. 172; *New Alaska Development Corp., Alaska Housing Corporation*, 194 NLRB No. 137.

tices, but to declare their intention to disregard any certification that might come out of an election, and still escape a bargaining order because the union did not file a petition. Such a rule encourages recalcitrance on the part of employers without any corresponding furtherance of any other policy embedded in our labor laws. It seems to me it subverts the purposes and the policies of the Act we are sworn to enforce. I therefore dissent from its application herein.

For the foregoing reasons, I dissent from my colleagues' failure to reaffirm the Supplemental Decision and Order in this case and from their dismissal of the complaint.

Dated, Washington, D.C.

NATIONAL LABOR RELATIONS BOARD,
JOHN H. FANNING, *Member.*

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